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Family Court of Australia

Re Patrick [2002] FamCA 193 (5 April 2002)

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[2002] FamCA 193

FAMILY LAW ACT 1975

FAMILY COURT OF AUSTRALIA ***JSPATRICK***

AT MELBOURNE NO. **ML** 10036 of 1999

IN THE MATTER OF:

"RE. PATRICK"

007-18

(AN APPLICATION CONCERNING CONTACT)

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JUDGMENT DELIVERED BY

THE HONOURABLE JUSTICE GUEST

EDITED FOR PUBLICATION

DATE OF HEARING: 21, 22, 23, 24, 25, 29, 30, 31 JANUARY 2002

1 FEBRUARY 2002

DATE OF JUDGMENT: 5 APRIL 2002

Appearances:

Ms Mendes Da Costa of counsel, instructed by Counsel & Kelly Family Lawyers, DX 38229 Flagstaff, on behalf of the Applicant (mother)

Ms Glaister of counsel, instructed by Counsel & Kelly Family Lawyers, DX 38229 Flagstaff, on behalf of the second named Applicant (co-parent)

Mr Udorovic QC with Ms Johns (and Mr Sweeney of counsel) instructed by Messrs Clarke & Triado, Solicitors, DX 12403 Camberwell, on behalf of the Respondent (father)

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Dr Kovacs of counsel, instructed by Victoria Legal Aid, 350 Queen Street, Melbourne 3000, on behalf of the Child Representative

Re Patrick

ML 10036 of 1999

Coram: Guest J

Date of hearing: 21, 22, 23, 24, 25,2 9, 30, 31 January 2002, 1 February 2002

Date of judgment: 5 April 2002

CONTACT – child born as a result of artificial insemination of one of two lesbian partners by homosexual sperm donor – contested agreement – father seeking increased contact with the child – mother and co-parent opposing order and seeking that contact be restricted to twice-yearly – whether it is in the best interests of the child to have increased contact with his father – section 68F(2) factors

PARENTING – whether the father is a 'parent' under the Family Law Act and Child Support (Assessment) Act – meaning of 'family' – nature of parenting – gay and lesbian families – Family Law Act sections 60B, 60H

In January 1998, the father entered into an agreement with the mother and her lesbian partner ('the co-parent') to provide genetic material for the purpose of artificially inseminating the mother. The terms of the agreement were bitterly contested at the hearing.

After approximately 12 months of insemination attempts the mother conceived in January 1999. The father was informed of the conception and for several months the arrangements proceeded amicably. However, with the effluxion of time the parties' relationship became embittered and disagreement as to the role of the father in the child's life surfaced.

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After attending two mediation sessions and failing to reach an agreement as to the father's role, the mother and co-parent unilaterally decided not to involve the father any further in their plans for the birth and went into hiding.

Patrick was born on 11 September 1999. The father was informed of the child's birth by a friend. The father remained unaware of the mother and co-parent's whereabouts.

On 18 October 1999 the father filed an Application for Final Orders in which he sought joint responsibility with the mother for the long term care, welfare and development of Patrick, as well as graduating contact as the child got older. The mother opposed the application.

On 23 November orders were made by consent that leave be granted to the co-parent to intervene in the proceedings.

The parties attended confidential counselling on 6 December 1999. No resolution was achieved. However, from December 1999 the father began having contact with Patrick pursuant to consent orders.

On 2 June 2000 Final Orders were made by consent awarding the mother and co-parent joint responsibility for decisions concerning the long term and day to day care, welfare and development of the child. The father was granted contact for two hours each third Sunday to increase as the child got older.

Following the Final Orders contact proceeded but the relationship between the mother and co-parent and the father further deteriorated. In particular, the mother and co-parent sought to impose upon the father restrictions during contact, including that he not refer to himself as Patrick's 'dad'.

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After several months of bitter correspondence between the parties and the unilateral cancellation of several contact visits by the mother and co-parent, on 8 May 2001 the mother and co-parent filed an application in the Federal Magistrates Service seeking to discharge the contact orders made on 2 June 2000. They refused to permit the father any further contact with Patrick.

The father opposed the application and sought fortnightly contact, graduating to overnight and school holiday contact as Patrick got older.

Held, (in allowing the application):

(per Guest J)

1. In deciding an issue such as this, section 65E of the Act requires the Court to regard the best interests of Patrick as the paramount consideration. It is a consideration of those best interests which forms the cornerstone of the judgment and remains its final determinant.

B and B: Family Law Reform Act 1995 (1997) FLC 92-755

2. Patrick has a loving relationship with the mother and the co-parent. They are, and have at all times been, his primary care givers. As matters now stand, Patrick is familiar with his father, comfortable in his presence and gains considerable reward and benefit from their mutual interaction. The father has sensitively approached the issue of his contact with Patrick, demonstrating both compassion and understanding. Patrick has much to gain from contact with his father.

3. The orders sought by the father appear to be a carefully considered proposal with a graduated increase in his contact with Patrick and underpin a responsible awareness to the current situation and promotion of Patrick's best interests.

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4. There is no decision in Australia that specifically addresses the issue of whether a sperm donor, whether anonymous or known, is a 'parent' within the meaning of the Act, though the Full Court has held that a sperm donor for a lesbian couple is not a 'parent' for the purposes of the Child Support (Assessment) Act.

B v J (1996) FLC 92-716 (per Fogarty J)

5. The effect of s 60H(3) of the Act is that where under a prescribed law of a State or Territory the child is a child of a man, the child is also to be regarded as his child under the Family Law Act. Thus a child is to be regarded as the child of the biological father and the biological father a 'parent' only if there is a specific State or Territory law which expressly confers that status on a sperm donor for the purposes of the Act. There are no prescribed laws on any State or Territory to that effect.

Family Law Act 1975 s 60H, Status of Children Act 1974 (Vic) section 10F

6. In the absence of express provisions in federal law, the Act can and should be read in light of such state and territory presumptions, thereby leaving the sperm donor, known or unknown, outside the meaning of 'parent'. The father is thus not a 'parent' under the Act.

Family Law Act 1975 section 60H

7. Given the father's active role in Patrick's conception and his ongoing efforts to build a relationship with his son, it is difficult to understand that he is excluded, for the purposes of the Act, from being properly known as a 'parent' of Patrick, but merely to have jurisdictional status in the Family Court as "...any other persons" concerned with Patrick's welfare.

8. It is time for State laws to be enacted to make available to lesbian women 007-24 known donors a well-regulated scheme with all the safeguards, medical and otherwise, available to heterosexual couples. There is no doubt that the parties in this case would have benefited from such services and may not be in the position they are today had they been able to access counselling currently available to heterosexual couples.

9. Given the diversity of gay and lesbian families and the varying roles donors play in the lives of children conceived using their donated sperm the legislature needs to reassess section 60H of the Act and to consider the ramifications of its application in cases such as this. While the legislature may face unique challenges in drafting reform that acknowledges and protects children such as Patrick, and the family units to which they belong, this is not a basis for inaction.

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1. INTRODUCTION

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1. The proceedings before me involve a sperm donor who is a homosexual, 007-26 committed lesbian couple and a two year old boy. They have brought into stark relief the complexities surrounding donor insemination and its relationship with family law.

2. The history and the factual circumstances surrounding these competing applications are complex. In January 1998, the donor (to whom I shall refer as the father, which is not a statement of law) entered into an agreement with the mother and the co-parent to provide genetic material for the purpose of artificially inseminating the mother. The terms of that agreement were bitterly contested at the hearing. Following many months of co-operative endeavour, the mother conceived and together with the co-parent, they informed the father of this fact in early January 1999. Their relationship thereafter soured. The birthing arrangements of Patrick, who was born on 11 September 1999, were concealed from the father who, upon learning of the birth, instituted proceedings (inter alia) for contact with Patrick. Despite final orders for contact subsequently being made by consent on 2 June 2000, the dispute re-emerged at the instigation of the mother and co-parent, with the result that each of the parties are now painfully polarised in their respective positions.

3. The proceedings before me commenced by way of a Form 3 Application jointly filed by the mother and the co-parent on 8 May 2001 that paragraphs 4, 5, 6, 7 and 8 of the final orders made on 2 June 2000 be discharged. The relevant orders made that day by Registrar Harold, with all parties being represented by counsel, were as follows:

> "2. That the child Patrick born on 11 September 1999 reside with the mother and the co-parent.
>
> 3. That the mother and the co-parent have joint responsibility for decisions concerning the long term and day to day care, welfare and development of the child.
>
> 4. That the mother and the co-parent keep the father advised of any major health and education issues concerning the child.
>
> 5. That the father have contact with the child as follows:

(a) Each third Sunday from 8.30am to 10.30am or such other day or times as may be agreed commencing 25 June 2000. 007-26

(b) Such other contact as may be agreed.

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(c) At the residence of LD or JB or such other venue as may be agreed.

(d) That upon the mother and the co-parent providing to the father 21 days' notice in writing of their intention to and dates of travel, contact for one period shall be suspended on one occasion in the year 2000.

(e) With the person nominated by the mother and the co-parent to be available to the child.

6. That each party keep the others advised of their residential address and contact telephone number.

7. That if contact is unable to take place pursuant to 5(a) then contact shall take place on the following Sunday or at such other date or time as may be agreed.

8. That pursuant to Section 65L these parenting orders be supervised until 2001 by such counsellor as nominated by the Manager of Mediation to give any party to these orders such assistance as is reasonably requested by that party in relation to compliance with, and the carrying out of the parenting order.

...

...

AND THE COURT NOTES:

1. That it is understood between the parties that these contact orders are to remain in place until the child attains two years of age at which time they are to be reviewed to increase as age appropriate.

2. That the mother and the co-parent shall not be present during contact save by agreement between the parties.

3. That the father consents to order 3 hereof in order

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> to promote the relationship between the mother and the co-parent and his relationship with them."

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4. The father filed a Form 3A Response on 17 May 2001 and sought final orders for contact with Patrick as follows:

> "1. That as from 11 September 2001, Order 5 of the orders of 2 June 2000 be discharged and that father have contact with the child as follows:

(a) from 10am to 1pm on 16 September and 30 September;

(b) from 10am to 3pm on 14 October, 28 October and 11 November;

(c) from 10am to 5pm on 25 November and each alternate Sunday thereafter until the child is three years of age;

(d) that the father have overnight contact with the child from Saturday 5pm to Sunday 5pm on five occasions before the child is three years of age such contact to coincide with the contact weekend in paragraph (1)(c) hereof;

(e) from 10am Saturday to 5pm each alternate weekend commencing when the child is three years of age;

(f) such further or other contact as agreed between the parties."

5. The orders sought by each of the parties are now different from those sought upon filing their applications and I propose to address that aspect later in my judgment. However, it is sufficient to say at this stage that the mother and the co-parent are agreeable to the father having contact with Patrick at least twice a year for a period of no more that three hours or at a greater frequency and duration if agreed to by them.

2. BACKGROUND

6. The father was born on 5 March 1951 and is now 51 years of age. The mother was born on 23 October 1961 and is 40 years of age. The co-parent was born on 16 July 1962 and is 39 years of age.

7. The father and the mother first met socially in 1989. The mother and the co-parent commenced their relationship in 1992 and took up residence together in a committed lesbian relationship in 1995. They physically separated on 16 December 1997 and, although remaining in a relationship, they lived apart until 28 February 1998.

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8. In October 1997 the mother placed an advertisement for donors in the Melbourne Star Observer, a gay and lesbian newspaper. The advertisement (omitting the contact details) read as follows and ran in a number of subsequent issues:

Mixed Personals

attractive, creative Intelli-

gent gay woman seeks sperm

donor / co-parent. Gay man

/ couple preferred. Level of

involvement negotiable,

GOSH essential.

[GOSH, meaning "good sense of humour"]

9. After the co-parent and the mother moved into separate homes, the mother interviewed two prospective donors on 30 December 1997 and 4 January 1998. On 5 January 1998 she invited the father to her home for the purpose of interviewing him as a prospective donor. Following that meeting, the father confirmed his willingness to be a donor on 12 January 1998. In furtherance of their initial agreement, the father attended a Sexual Health Centre on 15 January 1998 to be tested for any sexually transmitted disease in anticipation of attempting to conceive a child with the mother. On 30 January 1998 all parties met at a restaurant to discuss the proposed pregnancy and their parenting arrangements.

10. The first private artificial insemination session took place on 31 January 1998. In all there were 27 (on the father's version) or 35 (on the mother's version) separate attempts between 31 January 1998 and 16 December 1998 engaged in by the mother and the father in furtherance of their agreement. The co-parent was also present on a number of occasions.

11. Shortly prior to the mother and the co-parent resuming co-habitation, the mother attended a meeting in February 1998 of prospective single lesbian parents at which she discussed the father's role pursuant to their arrangement. This particular meeting, which was also attended by Ms G , achieved prominence in the course of the proceedings and is a matter to which I shall

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shortly refer.

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12. There were a number of further events that were significant and in relation to which there is no disagreement between the parties. For example, on 20 March 1998 the father attended the Mercy Hospital for semen analysis at the request of the mother due to their failure, to that date, to achieve pregnancy. On 3 May 1998 he attended a house-warming party at the home of the mother and co-parent. It appears that their relationship was quite cordial. At one stage during the attempted artificial insemination process, the father travelled to Amsterdam to compete in the Gay Games. He has an active interest in sport. He was absent for about two months.

13. Following his return from overseas the parties met at a restaurant on 13 October 1998 where they discussed the continuation of the process of artificial insemination.

14. In early January 1999 the mother and co-parent informed the father that the mother was pregnant. They attended a celebratory dinner on 5 January 1999 and subsequently, on 31 January 1999 the mother and co-parent held a meeting of the prospective single lesbian parents support group at their home. Ms G also attended that meeting at which the mother announced the news of her pregnancy. Shortly thereafter, the parties attended a social function at the home of RF, (a friend of the father's) on 28 February 1999 where they announced to their friends the news of the pregnancy.

15. However, with the effluxion of time their once amicable and agreeable relationship became progressively embittered. On 8 March 1999 the parties met at the home of the mother and co-parent in order to discuss various matters relating to the pregnancy and care of their prospective child. During the course of that meeting the mother announced that she did not want the father present at the birth. Several days later, the co-parent telephoned the father and informed him that the mother had been accepted into a Birthing Centre. On 13 March 1999 the father telephoned the mother and co-parent requesting they reconsider their decision regarding his attendance at the birth.

16. On 14 April 1999 the parties attended a mediation session with a Mr Michael Madden. It was at that meeting that the mother and co-parent provided to the father a draft agreement of the proposed care arrangements for the prospective child which had been drafted by them. No agreement was reached. They attended a further meeting with Mr Madden on 21 April 1999. A third meeting, scheduled for 7 May 1999 was cancelled by the mother and the co-parent and it appears, from this point of time, the mother and co-parent unilaterally decided not to involve the father any further in their plans for the birth.

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17. The father then engaged a solicitor. On 29 July 1999 his solicitor wrote to the former solicitor for the mother and co-parent and (inter alia) had this to say:

> "...
>
> Our client instructs that your clients moved and he does not have their current address. We have enclosed a letter and ask that you please forward to (sic) this your clients on our client's behalf. We would be grateful if you would provide us with details of your clients' current address.
>
> Our client also wishes to inquire as to how the mother's pregnancy is progressing and whether or not she intends to deliver at the (Birthing Centre). He also seeks information as to the anticipated delivery date.
>
> We look forward to your response."

18. The former solicitor for the mother and co-parent replied on 12 August 1999 advising that they no longer held instructions to act and set out the last address they had for the mother and co-parent. They further advised they were unaware of the hospital into which the mother was booked for the birth or of the anticipated delivery date.

19. It is common ground that in September 1999 the father telephoned LD, a close friend of the mother and co-parent to ascertain their whereabouts and also to enquire as to the progress of the pregnancy. No information was provided. He telephoned the mother's former work place and the Birthing Centre to ascertain her whereabouts. All enquiries made by him failed.

20. As I said, Patrick was born on 11 September 1999. The father was subsequently informed of the birth by a friend. Still unaware of their whereabouts, he employed the services of a private investigator on 28 September 1999. The father caused to be filed a Form 7 Application for Final Orders on 18 October 1999 in which he sought (in summary) the following:

- that the mother and father have joint responsibility for making decisions concerning the long term care, welfare and development of Patrick;
- that the child reside with the mother, and

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- that the father have contact with Patrick:

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- on two occasions each week for two to three hours until the child was nine months old;

- thereafter on two occasions each week for five hours, and

- on two occasions each week to include overnight after Patrick was two years of age.

21. On 9 November 1999 the mother filed a Form 7A Response seeking that the father's application be dismissed and in the alternative:

- that Patrick live with the mother and co-parent who shall retain joint responsibility for his long term care, welfare and development;
- that the mother and co-parent be responsible for Patrick's day to day care, welfare and development, and
- that the father have supervised contact with Patrick twice yearly as agreed between the parties.

22. The applications were adjourned to 23 November 1999. On 12 November 1999 an appointment for confidential counselling was cancelled by the mother. On 23 November 1999 an application was filed by the co-parent for leave to intervene in the proceedings. On that day, orders were made by consent that leave be granted to the co-parent to intervene in the proceedings and that she file a Form 7A Response on or before 6 December 1999. All existing applications were then adjourned to the Registrar's Duty List on 14 December 1999 and it was further ordered that all parties attend counselling pursuant to S 62F(2) of the *Family Law Act* 1975 (as amended) ("the Act") on 6 December 1999 and such other dates as may be directed.

23. The parties attended separate appointments for confidential counselling on 6 December 1999. No resolution was achieved. On 9 December 1999 the co-parent filed a Form 7A Response seeking an order that the father's application be dismissed and that she and the mother have joint responsibility for the long term and day to day care, welfare and development of Patrick. She sought further orders that the child reside with the mother and herself and that the father's contact with Patrick be otherwise reserved.

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24. On 14 December 1999 the proceedings were adjourned by consent to 10 February 2000. However, prior to that date and on 16 December 1999 the father had his first contact with Patrick, who was then aged 14 weeks. The contact took place at the Family Court. He had further contact with the child on 28 January 2000. Those contact arrangements were pursuant to orders made by consent. On 10 February 2000 orders were made appointing a Child Representative and otherwise adjourning the proceedings to 31 March 2000. In addition, further orders were made by consent which provided:

> "That the father have contact with Patrick on 5 March 2000 and 25 March 2000 between 10.30am and 12 noon (or on such other dates as may be agreed) between the parties."

It was further ordered that the mother, the co-parent and RF, be permitted to be present during contact to be exercised at the home of LD (or at such other location as may be agreed). It was also ordered by consent that all parties attend upon Mr Vincent Papaleo for the preparation of a welfare report to the court.

25. The father had contact with Patrick at the home of LD and on 29 March 2000 Mr Papaleo delivered his first report. I propose to deal with that report later in my judgment.

26. On 31 March 2000 orders were made by consent adjourning the further hearing of the proceedings to 2 June 2000. It was also ordered that the father have contact with Patrick between 10.30am and 12pm on each of 16 April 2000, 5 May and 27 May 2000. Further, that the mother, the co-parent and RF (or in the event that he was unavailable), a named friend of the father's, be permitted to be present during contact. Orders were also made as to where contact was to take place.

27. The contact scheduled for 16 April 2000 was cancelled by the mother and co-parent. No make-up contact was offered. However, the father had contact as ordered on both 5 May and 27 May 2000. On 2 June 2000, final orders were made by consent in the terms set out in par 3 of this judgment.

28. Following those orders, the father had contact with Patrick at the home of LD until 31 December 2000 when the mother and co-parent cancelled the next scheduled contact period. As a consequence, the father had no contact with Patrick between 10 December 2000 and 21 January 2001.

29. On 26 October 2000 the mother and co-parent wrote a letter to the father and (inter alia) requested that he did not refer to himself as Patrick's "... *dad*

during contact and not to refer to members of his family as Patrick's relatives.' 007-34 the course of that letter, they had this to say:

> "...
>
> It has come to our attention that during contacts you are introducing your family members to Patrick using familial terms like 'your grandmother', 'your aunt' and 'your cousin'. Presumably you are also referring to yourself, or being referred to by your guests, as Patrick's 'dad'. This method of introducing your family, and labelling his relationship to them is likely to cause Patrick confusion and distress in the future as it is in direct contradiction to the reality of how Patrick experiences his family and the way in which we will be speaking of you and your family.
>
> It is clearly our responsibility as Patrick's lesbian parents and the people who have long term and day to day care for Patrick, to ensure that Patrick feels positive about and understands his alternative family structure and his method of conception, and to guide Patrick through the associated complex emotional, ethical and social issues. It is our responsibility to ensure that the people Patrick has contact with respect him, his family and the decisions we make as his parents. These people include you and the people you bring to contacts.
>
> [Later]
>
> Patrick has contact with lots of people who aren't in his direct family or extended family but who are never-the-less significant. This includes the contact he has with you and your family. Patrick will know that you and your relatives have a biological relationship to him because he will know that you are his donor. We are happy to refer to you as the father in Patrick's presence, **but absolutely do not accept or support you referring to yourself, or encouraging Patrick to call you dad, father or any other such title. Nor do we accept or support familial terms like grandmother/grandson, aunt/nephew or cousin to be used in Patrick's presence in reference to your relatives.**
>
> [Later]
>
> Patrick lives in a cultural and community setting in which his family as we define it is acknowledged and affirmed:- by us, his extended

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family, our friends, his playgroup and the broader gay-friendly members of our society. He often hears the word donor and already knows many children in similar situations who have varying levels of contact with their donors. **Patrick will grow up knowing the difference between a donor and a father. The discrimination against lesbian families is considerable** and the decisions we are making in regard to how to support Patrick in this regard are not made on a whim but rather through extensive personal experience and research:- books, articles, conferences, support groups, professional advice and anecdotes. **Patrick is part of a socially disadvantaged minority group, and thus has special needs ...**

We believe that you can chose to make Patrick's life easier by supporting us in the decisions we make as Patrick's parents, and that you can use contacts as a time in which to establish a relationship with Patrick **which is not based so much on pre-conceived roles such as 'father' and 'son' but on a more individual basis. ...**

Patrick will eventually be old enough to understand the issues that surround his family, his conception and the broader matrix of his biological origins. Until he is old enough not to be confused or overwhelmed by these issues we, as his parents, will be making those decisions for and with him. If we are ever going to be able to speak amicably to Patrick about you and your family, we need to feel that you are granting the same respect that you would offer any other intact, valid and complete family. We are proud of our family and would certainly prefer to be in a position where we could encourage Patrick to be proud of his connection to you.

..." (emphasis added)

30. The father replied to that letter on 6 December 2000. In my view, it was a conciliatory, sensitive and understanding letter in which he had this to say:

"Thank you for your letter of 26 October. It was great to see Patrick last time on 26 November, he is really looking well and happy. Thank-you once again for making the visits possible and please pass on my thanks to LD for her kindness in giving up her time and making her house available. I look forward to these visits with Patrick and he is a credit to you both. He is growing up so fast now and I notice quite distinct changes every time I see him. While this has been a terribly difficult time for us all I tell myself that the most

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important thing is that Patrick is healthy and happy. I hope that things can improve between us. 007-36

I have taken on board, and accept your concerns about how my relationship with Patrick can be best explained to him in the future. In the agreement between us signed in June this year I did sign over to you both, residence, day to day and long term care and decision making for Patrick. This was agreed to by me at that time for the following reasons:

- That I believed it was in Patrick's best interests;
- To show my willingness to support you both and your position as Patrick's primary care givers;
- To try to improve the situation between myself and you both;
- To avoid further damaging and costly litigation.

In no way do I wish to undermine your relationship and I haven't sought to do this in the past. I do however remain father to Patrick and have not given up any of the responsibilities or rights associated with fatherhood. It was agreed from the beginning that I would be a dad/father to our child and it was never agreed by me that I might be seen simply as an uninvolved donor.

Further I am concerned at the confusion Patrick might experience if I am described to him other than as his father. I believe it is important that Patrick should know that he does indeed have a father and one who he has seen regularly and continues to see regularly. It is undesirable for Patrick to grow up believing that there is something missing in his life, his father, when that is clearly not the case at all. It is far better for Patrick to know that he has a father who loves him very much and who he sees on a regular basis. This may not be what you both want and it may not be what I want but I believe that it is in Patrick's best interests.

In June this year I was challenged by Vincent Papaleo's report to the court to accept you both as Patrick's parents. I have tried my best to do so and as I said earlier Patrick is clearly a credit to you both. You too were challenged by the same report to accept that it is in Patrick's best interests for him to bond with his father and to have an ongoing relationship with his father. 007-36

I would ask that you consider this.

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..."

31. On 7 December 2000 the mother and co-parent again wrote to the father complaining that Patrick had been returning from contact "... *unusually tired and vulnerable".* They expressed concern that there had been a gradual erosion of LD's role during contact and asserted that:

> "... LD needs to be able to be within sight or hearing of Patrick during most of the contact periods so that she can assess whether Patrick needs her, and so Patrick can be reassured by her presence or express his desire to be with her. We have discussed this matter with LD at length and have all agreed that LD needs to be more present during contacts".

32. The father resumed contact with Patrick on 21 January 2001. The parties then attended confidential counselling pursuant to s 65L of the Act on two occasions in March 2001. No agreement was reached. The mother and co-parent imposed conditions upon the father's contact with Patrick which he considered to be unreasonable, for example, that he take only one photograph during the contact period and not have a friend or family member accompany him. On 27 March 2001 the father's solicitors wrote to the mother and co-parent's solicitors referring to the restrictions placed upon contact by them and responded with the following:

> "1. That Patrick is scared when they or their friends try to take a photo. Our client has agreed to take one photo only during his contact visits. It is agreed that our client is to bring the camera out and leave it for ten minutes or so and then ask Patrick if he can take the photo and respond accordingly.
>
> 2. That LD finds it offensive that our client spreads his rug on the floor at contact as it constitutes a hazard as Patrick may trip on the rug. Our client has agreed that he will not spread the rug on the floor for Patrick. He will use the rug for his own benefit if necessary.
>
> 3. Our client has been permitted to use LD's tape player to play music but he is not permitted to bring his own tape player as this constitutes 'too much' input for Patrick.

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4. Our client has been bringing a whole bag full of toys to contact. This is apparently too much input for Patrick and our client is permitted to bring one or two toys only.

5. There has been an agreement that our client will begin the 'goodbye ritual' by packing up his things before the end of the contact visit and being ready to leave rather than LD signalling the end of the contact visit by announcing that there are just a few minutes left, Patrick being passed to her and whisked away to the back of the house whilst our client packs up and prepares to leave.

6. Our client is permitted to provide his drink cup for Patrick (his Christmas present) to fill it for him and offer it to him, but is not to compete with anything which LD might offer him.

7. Our client is to ensure that Patrick remains strictly within the fence line and is not to walk on the footpath or the nature strip. The contact visit is to be restricted to the boundaries of LD's property."

33. The father again wrote to the mother and the co-parent regarding restrictions imposed by them during his contact with Patrick. The position worsened and on 28 April 2001 the co-parent telephoned the father and unilaterally cancelled a contact period scheduled for 29 April 2001. In the result, the father did not have contact with Patrick by reason of the mother and co-parent's unilateral actions from 25 March 2001 until orders were made by Federal Magistrate Phipps on 11 July 2001.

34. The mother and co-parent failed to attend a further scheduled counselling session on 1 May 2001. On 2 May 2001 the solicitor for the mother and co-parent wrote to the father's solicitors advising that an application was to be filed seeking discharge of the contact order as they considered that his contact was not in Patrick's best interests. On 6 May 2001 the father attended the home of LD for contact purposes. Contact was refused. On 8 May 2001 the mother and co-parent did in fact cause to be filed an application out of the Federal Magistrates' Court seeking (inter alia) a discharge of the contact orders made on 2 June 2000. They refused to permit the father any further contact with Patrick.

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35. On 17 May 2001 the father responded to their initiating application 007-39 sought the orders to which I have earlier referred in par 4 of this judgment. On 19 June 2001 orders were made by consent re-appointing the Child Representative. On 11 July 2001 orders were made by Federal Magistrate Phipps that the parties attend upon Dr Robert Adler for the purposes of a welfare report and that contact ordered pursuant to par 5 of the order made on 2 June 2000 be resumed on 15 July 2001 between the hours of 9.30am and 11.30am. Subsequently, on 10 August 2001 further orders were made by the Magistrate transferring the proceedings to the Family Court of Australia.

36. On 23 October 2001 Dr Adler delivered his report in which he recommended that (inter alia):

> "3. the father be allowed contact with Patrick at least twice a year for a period of no more than three hours on each occasion or at a greater frequency and duration if agreed by the mother and the co-parent.
>
> ...
>
> 7. As Patrick gets older his wishes regarding contact with the father should be respected and his frequency of contact varied accordingly."

37. On 16 November 2001 the solicitors for the mother and co-parent wrote to the father's solicitors proposing settlement in the terms of Dr Adler's recommendation. That was rejected by the father's solicitor on 21 November 2001. Towards the end of 2001, the mother and co-parent unilaterally cancelled the father's scheduled contact to Patrick on two occasions. It was with that background the proceedings commenced before me on 21 January 2002 and continued over nine sitting days.

3. THE LAW

38. In deciding an issue such as this, s.65E of the Act requires me to regard the best interests of Patrick as the paramount consideration. Accordingly, it is a consideration of those best interests which forms the cornerstone of my judgment and remains its final determinant. See *B and B Family Law Reform Act 1995* (1997) FLC 92-755 at par 9.51.

39. In determining that which is in Patrick's best interests, there are a number of matters which I must consider. They are set out in s.68F(2) of the Act, to which I will return later in this judgment. Subject to matters I will later discuss, 007-39

discharge my task in these proceedings having regard to the objects principles set out in s.60B of the Act which is in the following terms: 007-40

> "60B(1) The object of this Part is to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.
>
> (2) The principles underlying these objects are that, except when it is or would be contrary to the child's best interests:
>
> > (a) children have a right to know and be cared for by both their parents, regardless of whether their parents are married, separated, have never married or have never lived together; and
> >
> > (b) children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
> >
> > (c) parents share duties and responsibilities concerning the care, welfare and development of their children; and
> >
> > (d) parents should agree about the future parenting of their children."

40. It is important to consider what the Full Court said in *B and B Family Law Reform Act 1975* (supra) at par 9.54 when dealing with s.60B of the Act. The Court made it clear that the section is a significant part in the exercise as it represented a deliberate statement by the legislature of the object and principles which I am to apply in proceedings under Part VII of the Act. However, the section is subject to s.65E of the Act. The Full Court pointed out that s.60B did not purport to define or limit the full scope of what is ordinarily encompassed by the concept of best interests and went on to say:

> "The object contained in subs (1) can be regarded as an optimum outcome but is unlikely to be of great value in the adjudication of individual cases. The principles contained in subs (2) are more 007-40

007-41

> specific but not exhaustive and their importance will vary from case to case. They provide guidance to the court's consideration of the matters in s.68F(2) and to the overall requirement of s.65E. The matters in s.68F(2) are to be considered in the context of the matters in s.60B which are relevant in that case. But s.65E defines the essential issue."

See also *Paskandy v Paskandy* [1999] FamCA 1889; (1999) FLC 92-878 at par 35.

41. By reason of the manner in which these proceedings have been conducted by the parties, it will be necessary in the course of my judgment to make comments about and certain criticisms of them. I emphasise at the outset that my comments and criticisms are not intended to insult, belittle or to undermine the confidence of any of the parties. On the contrary, it is hoped that the findings I make in this judgment will be considered carefully by them, used positively to benefit Patrick and for the parties to better understand an objective consideration of those matters that I consider suitable to accord his best interests in the complex, unusual and discrete circumstances of these proceedings.

42. The appropriate standard of proof that I should apply to the various issues in contest is the civil standard, namely the balance of probabilities. In *Briginshaw v. Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 361-2, Dixon J said:

> "Except upon criminal issues to be proved by the Prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal."

[See also Barwick CJ, Kitto, Taylor, Menzies and Windeyer JJ in *Rejfek & Anor. v. McElroy & Anor.* [1965] HCA 46; (1965) 112 CLR 517 at 521; *Neat Holdings Pty Ltd v. Karajan Holdings Pty Ltd* [1992] HCA 66; (1992) 67 ALJR 170 at 172; and s 140 *Evidence Act* (1995) Cth.

4. THE EVIDENCE

007-41

43. It was at my direction that counsel for the parties prepared an agr 007-42 Statement of Facts in Issue and which comprehensively prescribed the various matters for my determination. At the commencement of the proceedings I also had counsel detail all affidavits relied upon. In coming to my decision I have regard to those affidavits, to the paragraphs of other affidavits referred to during the evidence and to the oral evidence otherwise given in court. For the purposes of this judgment when dealing with the evidence, I have framed a number of specific headings which are, regardless of that specific identification, also intended to form part of my general findings relevant to all of the facts in issue for my determination.

4.1 ISSUES OF CREDIBILITY

44. At the commencement of the applications all counsel submitted that, given the antithetical evidence of the parties in their respective Order 30 Affidavits, credibility would be an important issue for my determination. It was with this in mind that I addressed myself carefully both to the presentation and content of their evidence. In so doing, I was alert to make appropriate allowance for any anxiety or tension that a witness may understandably experience when giving their evidence.

45. Given the above, matters of credit assumed significance in assisting me in my determination of relevant issues where the parties have advanced disparate versions of significant events. I have had the special advantage of observing the parties and their witnesses in court. In *Minagall v Ayers* (1966) SASR 151 at 154 Hogarth J had this to say:

> "It is, of course, proper and usual for the court to take note of the demeanour of a witness when in the witness box giving evidence. This is one of the most common and valuable means available in the court for arriving at the truth of the matter."

46. In *Government Insurance Office of New South Wales v Bailey* (1992) 20 NSWLR 304 at 313 (CA) Kirby, P (as he then was) said:

> "... By conventional theory the observations made by a trial judge of the appearance and demeanour of a witness giving evidence are not only available to be used in the determination of a dispute but amount to important ingredients in the decision-making process. They normally provide the primary decision-maker a distinct advantage which controls, and even limits, the exercise by the Appellate Court of its statutory functions in an appeal by way of a re-hearing ...

007-42

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> Justice is not truly blind. A decision-maker ... sitting in a court room is not blinkered. The decision-maker observes the drama which is played out in the well of the court room. As Jacobs, J. remarked in (*Jobst v Ingliss* (1986) 41 SASR 399) parties and witnesses frequently sit in court and grimace, frown, laugh and otherwise display facial and body language which is virtually impossible for the decision-maker to fail to see."

47. I was not impressed with the evidence of the mother. There was a clear tendency on her part to descend into non-responsive speeches and monologues emphasising the forcefulness of what I perceived to be an intransigent and uncompromising belief in her stated position before the Court. On several occasions I was obliged to request that she direct herself to the question. I observed her to display a modest degree of anxiety upon the commencement of her evidence, but this soon adjusted to a forceful presentation of her case with little associated stress. Towards the conclusion of her evidence, having been cross-examined at length over a number of hours, she displayed, not unnaturally in the circumstances, a tearful manifestation of distress. Overall, she had every opportunity to present her evidence and no complaint or submission was made by her counsel to the contrary.

48. I observed the mother to quickly adopt a position in the righteousness of her case which additionally involved, at times, gratuitously and unnecessarily denigrating the father. For example, she was asked about a dinner held on 5 January 1999 attended by the father, the co-parent and herself. The father had described it as a celebratory dinner and that they were all thrilled at the confirmation of the mother's pregnancy. When asked whether the father was 'thrilled' as alleged, the mother said, at first, that she did not know. When pressed, she said "... *I think he was amazed"* and went on to gratuitously add "... *I think he was just as amazed at the gorgeous men at the other table"*. She then said that she "... *did not think"* he was thrilled, and again reiterated that he had more focus on "... *the men at the other table than with the role he was to have as a father to the unborn child*". Having regard to all that I have heard, I reject that evidence as being risible. It was consistent, however, with her clear dislike of the father, and exemplified her endeavour to unfairly belittle him without justification and with her inability to make a clear and appropriate concession. I have no doubt that their meeting on that occasion was a significant and joyous occasion for all concerned.

49. In the course of her evidence the mother said that she thought the final consent orders of 2 June 2000 were made on the basis that the father would have contact, but in so doing, not as a "... *parent would in normal circumstances"*. I reject that evidence. She is an intelligent woman, and given

007-43

the strength of her views, I am satisfied she both read and understood each and every paragraph of those orders and their intended meaning. She was at the time advised by experienced counsel. I have no doubt that when the mother signed those orders she full well appreciated the father's role and the manner in which it would be undertaken by him.

007-44

50. The mother was cross examined at length in relation to other aspects of those orders which reflected clear concessions by the father and so obviously plain from its wording. She rejected the suggestion that those orders could be seen as a "... *real sign of respect and desire* (on the part of the father) *not to rock the boat",* and countered with it being a sign of his consenting "... *under pressure".* She hastily added that "... *we would probably end up in court and that he would see it as a stepping stone".* I reject that evidence. It was but one of a number of instances whereby the mother was plainly resistant to making appropriate concessions, seeking to advance her cause and in so doing, demean the father. In contrast, I accept the father's explanation for consenting to those orders namely, to promote the relationship between the mother and the co-parent and his own relationship with them. I accept that he also had regard to the comments made by Mr Papaleo in his first report of 29 March 2000 and accepted the reality that both the mother and the co-parent saw themselves as Patrick's sole parents. The father deposed that the orders were important to the mother and the co-parent and, by consenting as he did, he hoped it would demonstrate recognition of his respect for them as Patrick's parents. He said that he was attempting to display an understanding and willingness to listen to their concerns. I accept that it was his desire to promote their relationship.

51. The mother's attention was addressed to the first notation of those orders which reads as follows:

> "1. That it is understood between the parties that these contact orders are to remain in place until the child reaches two years of age at which time **they are to be reviewed to increase as age appropriate**". (my emphasis)

52. The mother conceded that it was a declaration of intent by the parties that the father's contact with Patrick would be reviewed by way of increase when Patrick was two years of age. She went on to add however that she did not "... *remember reading them on the day*". When shown the original Minutes of Consent Orders she accepted, (for it would be plainly absurd to have done otherwise,) that she would have read each page before she signed them. She further accepted that it would be fair to assume she had a full knowledge of the intent of the orders upon their execution.

007-44

53. I am satisfied that this is a further example of the mother being at first less than frank in her evidence until faced with the original Minutes signed by her that day. It was only then that a concession, and one which I observed was reluctantly made, was in fact proffered by her.

007-45

54. It was the mother's evidence that since April 2001 she and the co-parent had discussed artificial insemination of the co-parent by a known donor, who, for the purpose of these proceedings was called 'Harry'. She said that they first considered this prior to their initial discussions with the father. It was then that she conceded their plan was a continuing one and, for the first time, that they were in contact with a known donor who was willing to provide genetic material for the artificial insemination of the co-parent. She said that another (lesbian) couple in the play group at which Patrick attended had asked their donor (Harry) if he would be interested in providing his semen to the co-parent. She explained that Harry had fathered other children, one of whom was known to her and that he personally lived in a committed homosexual relationship. The mother has met the other child, who is approximately twelve months old, and that Harry has seen the child "... *about three or four times".* A notation from the medical notes of Dr Stafraci of 18 April 2001 records "... *met with potential donor with* (co-parent)*".* The mother explained that both she and the co-parent have met with Harry to discuss the issue which was a "... *positive experience"* for them. A further record from the medical notes of Dr Stafraci dated 7 May 2001 refers to the donor, (apparently Harry), and his partner having a close relationship with the lesbian couple who introduced the mother and co-parent to him. She described their friends as having "... *a great relationship with their donor".*

55. In my view, these matters were relevant to the proceedings before me and the omission of any reference to these events is most unfortunate and, in the absence of any explanation, appears to have been a conscious decision on the part of the mother and the co-parent. I am concerned that I have not been informed of the full circumstances concerning this relationship and their plans for the future.

56. The mother was referred to her meeting with the father on 5 January 1998. In her Order 30 Affidavit she had this to say:

> "8. In October 1997 I advertised for a donor. As a result of the responses to this advertisement I interviewed Richard on 30 December 1997 and Michael on 4 January 1998. I interviewed the father on 5 January 1998."

007-45

007-46

57. It is clear to me that the mother intended to convey that the father was interviewed following a response by him to the advertisement. In the result however, that eventuated not to be the case. The mother conceded, and in this instance, properly so, that her affidavit appeared to impute that the father responded to her advertisement. The mother said that she made it clear to the father that she was looking for a donor and went on to say "... *I did not specify he was one of many*". I am satisfied that the mother provided no indication whatsoever to the father that he was part of a selection process being undertaken by her. When first cross examined on this issue, and confronted with the clear inference that her affidavit was open to a conclusion that she had misled the father, she confidently countered that she had made the position clear in her earlier affidavits. In the result, that too transpired to be quite incorrect.

58. Mr Udorovic cross examined the mother in relation to the witness statement of Ms G and in particular to that aspect dealing with a group meeting of prospective single lesbian parents held on 31 January 1999. At one stage, the mother asserted that she informed those present that "... *we hoped there would be an amicable relationship with him* (the father) *and us*". When it was put by Mr Udorovic that she was making up her evidence as she went along, she then conceded that she did not have a specific memory of saying that at all. Mr Udorovic put to her that she was in effect tailoring her evidence and with that, I agree. Further, she went on to gratuitously add that she had "... *some concerns*" at the time, but did not raise them at the meeting. I reject that evidence. The impression I had on a number of occasions during the course of the mother's evidence was that she would reconstruct events and conversations to best suit her own case and, at times, regardless of the truth.

59. In an affidavit filed by the mother on 23 November 1999 she deposed that it was never contemplated that the donor would play an active role in the life of any prospective child. She said that the agreement between the parties "... *at all times*" was that the father was to be known as the donor. This was the position maintained by her before me. In the proposed agreement drafted by the mother and the co-parent, and presented to the father at the first session of mediation with Mr Madden on 14 April 1999, it is provided (inter alia) as follows:

> "8. All parties agree that in regards to any child born from the above said process of artificial insemination, both the RECIPIENT and the RECIPIENT'S PARTNER will be referred to as the child's mother's. The COUPLE agree that this same child may call the DONOR Father, Donor, Dad, Daddy or (the father's Christian name)".

007-46

Those two versions of events do not, in my view, sit happily together. 007-47

60. The evidence of the co-parent was in contrast to that of the mother. She earnestly endeavoured to answer all questions put to her, albeit utilising opportunities to promote and emphasise their case. Significantly, in my view, she made appropriate concessions and overall presented as a fairer and more reliable witness than the mother. Subject to a qualification to which I shall shortly refer, it appeared to me that she genuinely applied herself in an earnest attempt to understand both sides of this complex issue for my determination.

61. Somewhat unrealistically in the circumstances, but nevertheless to her credit, the co-parent on several occasions proposed that any resolution in the best interests of Patrick would be best achieved by mediation than by court order. The co-parent unhesitatingly accepted that the father was genuine in his claim for contact with Patrick, but qualified that concession by firstly suggesting, from her own observations, that there was a level of conflict between his own needs and those of Patrick. I found that to be somewhat vague and in any event she did not go on to particularise what she meant by that.

62. The other limb to her qualification was that despite the father having consented to orders in the terms of those made on 2 June 2000, she said that she did not believe the father just wanted contact, but wanted long term and day to day responsibility as well. The only evidence for that, she explained, was a reference in the letter from the father to the mother and co-parent dated 6 December 2000 and referred to in par 30 of this judgment where he said:

> "In no way do I wish to undermine your relationship and I haven't sought to do this in the past. I do however remain father to Patrick **and have not given up any of the responsibilities or rights associated with fatherhood**. It was agreed from the beginning that I would be the dad/father to our child and it was never agreed by me that I might be seen simply as an uninvolved donor.
>
> ..." (emphasis added)

63. The co-parent said that hers was not an "... *ungrounded*" fear, but was based on a number of other matters. When tested on that proposition, the co-parent was unable to articulate what those other matters were, other than to repeat what she had earlier proclaimed. In my view, that attitude of the co-parent is unfounded and irrationally based. I accept the father's evidence about his stated intention as set out in this judgment and in my view, the fear expressed by the co-parent is groundless.

007-47

64. The father presented in sharp contrast to that of both the mother and the

007-48

co-parent, but particularly the mother. He was calm and reasoned in the giving of his oral evidence, which was consistent with that to which he deposed in his various affidavits before the Court. I found him to be both credible and persuasive. He listened carefully to each question asked of him and to which he earnestly applied himself. He was not controlled by dogma, did not search for hidden motives, but applied himself consistently with the best interests of Patrick as the paramount consideration.

65. There were two areas of his evidence that came under sharp criticism from Dr Kovacs of counsel, who appeared for the Child Representative. That concerned whether or not there was a meeting held between the parties on 17 October 1998 and whether or not the father did in fact have in a bundle of cards which he brought with him on contact periods an anti-drug post card detailing a picture of a deceased young man in a toilet. I deal with each of these issues in detail later in my judgment. In each instance however and for the reasons stated, I find in favour of the father.

66. Having given these matters my most earnest consideration, I am satisfied that where the evidence of the father conflicts with the evidence of the mother and the co-parent on matters of significance to my determination, I prefer the evidence of the father.

4.2 THE ATTITUDE OF THE PARTIES

67. The mother saw no room for the father to have a paternal role, in the traditional sense, in the life of Patrick. To the contrary, she viewed him merely as a 'donor' of genetic material. The mother blanketed herself within the confines of her relationship with the co-parent and their household, which was "... *Patrick's family*", to the clear exclusion of the father other than as a known donor.

68. Their position, in so far as the father is concerned, was first heralded at the mediation session with Mr Madden on 14 April 1999, being several months following the announcement of the mother's pregnancy with Patrick. He was there presented with a draft agreement prepared by the mother and the co-parent. It is the father's evidence that this document by no measure reflected the totality of the discussion nor the accuracy of the various agreements that had earlier taken place between them.

69. On 22 May 2000, the mother's treating psychiatrist, Dr Simon Stafraci, in a psychiatric report on the mother required by her then solicitors, had (inter alia) this to say:

007-48

> "The psychological stress the mother has experienced as a consequence of these developments will undoubtedly manifest itself in her dealings with the father in future, and it is **highly likely that she will present to Patrick a negative view of his biological father** ..." (Emphasis added)

007-49

70. In an affidavit filed on 26 May 2000 the mother made it clear that when dealing with the co-parent, "... *there is no room in our relationship for a 'father'. I would never have had this child had I realised the intention of the donor (of) trying to destroy my family".* Significantly however, and despite those two events, it was only seven days later that the final orders were made by consent on 2 June 2000.

71. The resolution between the parties as evidenced by the consent orders soon changed as the mother and the co-parent unilaterally sought to bring contact to an end. They forwarded the letter of 26 October 2000, to which I have earlier referred, in which they expressed their clear views and emphasised that Patrick was part of a socially disadvantaged minority group and accordingly had special needs. They underscored their total autonomy over the care of Patrick, asserting, (inter alia):

> "... We are happy to refer to you as the father in Patrick's presence, but absolutely do not accept or support you referring to yourself, or encouraging Patrick to call you dad, father or any other such title. Nor do we accept or support familial terms like grandmother/grandson, aunt/nephew or cousin be used in Patrick's presence in reference to your relatives".

72. In the course of her oral evidence, the mother made it clear that the father was not to adopt any paternal or traditional 'fatherly' role toward Patrick. He was not to do anything that saw him acting out the role of being a "... *dad*". She spelled out with icy clarity that Patrick had no knowledge of there being 'a father' in his life. She said that the father was being asked to fulfil a role that she did not believe he could undertake. It was her view that if it was possible for him to have a role "... *with some contact*", but at the same time act in a way in which he was **not a parent**, then an arrangement for contact would be possible. She said that contact could not work if the father were to act as a parent. Somewhat challenging to the particular facts of these proceedings, she denied that it was 'artificial' to create such a situation.

73. It was her evidence that in the future, she would explain to Patrick that his father was a 'donor', but that he "... *was not your 'father'*". After some degree of debate when being cross examined by Mr Udorovic, she said that Patrick could call him "... *dad*", but that the father was not allowed to "... *relate to him in that*

007-49

way". When asked to explain what she meant by that, the mother said that 007-50 was to act in a "... *loving, warm and playful manner that did not challenge any decisions the co-parent and I may make"*. Having heard all the evidence, I am satisfied that is precisely what the father has in fact been doing during contact periods. He has, in a sensitive and compliant manner, followed all directions of any person over-seeing contact at the time and those of the mother and the co-parent, regardless at how unreasonable, fanciful and irrational they were. It appears to me that the mother is and has been plagued by an irrational application of definition to a situation where it was simply neither feasible nor appropriate to do so.

74. The mother denied that the father's consent to the orders of 2 June 2000 demonstrated a respect by him for her and her 'family'. When asked what more he could have done, she asserted that he should accept contact "... *by invitation only"*. The mother explained that the question of the father's contact with Patrick "*be reserved*" and that he should withdraw from Patrick's life, subject to the co-parent and herself permitting him to see Patrick at their discretion. That discretion was to be unfettered.

75. The mother's stated position of her view of the father's role was made perfectly clear in her evidence. She saw his contact with Patrick as being 'intrusive' upon her relationship with the co-parent "... *because he's enacting a parental role"* and then went on to add that he was utilising contact to collect affidavit material for court purposes. When clarification was sought in relation to that, she explained her view that the father was more interested in collecting affidavit material than he was in Patrick's welfare. She said he was acting in "... *bad faith"* and in his own interests, not those of Patrick. I reject that evidence.

76. The mother repeated an allegation she made in an affidavit that it was the father's intention to try to 'destroy' her family. She said that she was quite serious about that. I regard that evidence as simply fanciful in the circumstances. Mr Udorovic asked the mother what harm could come to her relationship with the co-parent if contact were to be ordered by the court as sought by the father. She explained that the family would "... *no longer exist"*. On the other hand, she made it clear however that if contact was refused, the family would continue to exist. She said that if an order was made for the father to have contact with Patrick, the court would in fact be ordering "... *the destruction of"* her family and that she and the co-parent would "... *no longer be Patrick's parents and have total control"*. Subsequently, she went on to add that it meant she was at risk of separating from the co-parent. I have no doubt that there would exist, at least for some time, feelings of anxiety and stress, but I do not accept that her relationship with the co-parent would be jeopardised to the 007-50 extent expressed by her. I am reinforced in that conclusion by the evidence of

the co-parent and also Dr Stafraci. The mother added, somewhat emotionally, that she would go "... *crazy*". I see that as an emotive figure of speech on her part and not a realistic proposition. 007-51

77. In the course of her evidence, the mother said that there was no need for a "... *parental*" father in Patrick's life. When asked why Patrick should be different from any other child and not have a right to know his father, the mother jauntily responded "... *because he's got leso's for parents*". I see that as no more than a flippant expression of a view seriously held by the mother, namely that she co-exists with the co-parent in a discriminated and socially disadvantaged minority group. I do not regard that as unrealistic. She said that if a parental relationship developed between the father and Patrick, it would conflict with the parenting offered by the co-parent and herself. In the course of her evidence, the mother at one stage angrily exclaimed that the father was the sort of person who would lie in order to bolster his case in the pursuit of his contact with Patrick. I reject that evidence.

78. The mother agreed, when cross examined by Mr Udorovic, that her objection to contact was based upon a fundamental belief that children can be raised in a lesbian household without a father (in the traditional sense). She said that she was seeking to have that belief sanctioned by a court order. Such evidence is consistent with that deposed to by her in her affidavit filed on 26 May 2000 that there was "... *no room in our relationship for a 'father' ...*". From what I have both heard and read, it is doubtless true that children can be happily raised within a homo-nuclear family, but the difference here is that the father desires and has always desired to play an active and fatherly role in the life of his son.

79. It appears that during her pregnancy and following her cancellation of the third mediation conference with Mr Madden, the mother decided, together with the co-parent, to keep her address and telephone number screened from the father. In effect, as Mr Udorovic put to her, they went "... *into hiding*". No doubt, it must have been a difficult time for the mother and the co-parent, given the way in which they lived during that period. She said that they kept the blinds shut, did not collect their mail, that she felt anxious when she left the home and that the hospital was put on alert, as were the hospital security guards. The mother asserted that she and the co-parent could not find a "... *safe place to give birth because* (the father) *might find us*". When asked why such measures were taken, she responded that it was in order to protect the child and their family. Both she and the co-parent plotted to avoid contact with the father, an avoidance which, the mother said, was intended to continue after Patrick's birth.

007-51

80. The mother said that both she and the co-parent would have contacted the

father when they were able to deal with the conflict and assess whether he was prepared to proceed with contact on the basis that he would not act as a parent/father in the traditional sense. In relation to this, the mother said that she would expect contact to be approximately two times per year or otherwise "*reserved*". If contact was offered, she made it clear that the father could "... *play with*" Patrick, but was not to act as a traditional father.

007-52

81. The mother said that it took some time for her to bond with Patrick and that the likeness of Patrick to the father was of concern to her. The mother deposed that as soon as Patrick was born, and she knew that he was a boy, she informed the co-parent that they had to protect the child. In her evidence she said that following the birth of Patrick it was difficult for her to be with Patrick or to recognise him as her child because his "... *donor was the father*" and that he had applied to court to have a parental role.

82. In her Order 30 affidavit filed on 20 December 2001, the mother had this to say:

> "38. ... From March to December 2000 Patrick often returned from contact smelling strongly of the father's body odour. I found the odour repulsive and could not hold Patrick straight after the contact, which stressed him and distressed me as I could see his distress. I tried to resolve this problem by using aromatic oils and by having the co-parent bath Patrick and change his clothes before he came to me. ..."

83. In her evidence before me, she said that it was "... *the smell of the donor*" that made her sick and that she felt she could not "... *connect*" with Patrick. She said it created a sense within her that Patrick was not her son, and that she was not his mother. This evidence was most unusual and of further concern to me.

84. The mother and the co-parent imposed conditions for contact which they viewed as being both fair and appropriate in the circumstances. They expected their conditions to be complied with and asserted that any failure to do so generated distress and heightened their lack of trust of the father. For example, in their letter dated 7 December 2000 to the father they had this to say:

> "... We also wish to note that during the last contact LD requested that you spend a good part of the contact in her living room, and not in the front yard, however you did not respect this request. This request was made because it is easier for LD to be available to Patrick when you are all in the lounge room. Her front yard is also quite open to the public, and your continued use of this space

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during contacts undermines her privacy. We hope in the future that you will comply with such requests. We feel that LD has been extremely generous in making herself and her house available during contacts, and in providing you and your guests with privacy and time alone with Patrick. It concerns us when LD is not accorded the respect that she deserves."

85. There was, throughout the mother's evidence, a correction offered by her on a number of occasions when the respondent was referred to as "*the father*". She made it clear he was the 'donor'. On one occasion it was put to her by Mr Udorovic that Patrick had two families. Her immediate response was "... *No, he has one family and he has a donor*". That is starkly consistent with her maintained concept of Patrick's family and the role in which she saw the father.

86. I am satisfied that the mother's attitude to the father has been a long standing one that at times, regrettably, bordered upon hatred. For example, in his medical notes Dr Stafraci recorded that on 23 December 1999 the mother said "... *I hate him ... I am incredibly angry ... I feel powerless – he can and will use the law*". On 19 January 2000 the mother again repeated to Dr Stafraci that she hated the father and on 31 January 2000 Dr Stafraci recorded "... *angered by his narcissism ... by his inability to 'see that I hate him'*". Finally, Dr Stafraci recorded on 27 March 2000 the mother saying "... *I hate him being near me*".

87. There were numerous examples in the course of the mother's evidence that overwhelmingly revealed her antipathetic and stubbornly resistant attitude to the father having an active traditional fatherly role in Patrick's life. In the course of cross examination, Mr Udorovic enquired whether there was any room in Patrick's life for a father to which the mother starkly replied "... *if you mean by that word, a parental role, no*". I observed the mother to be quite dispassionate, matter of fact and resolute in giving that answer. She continually maintained that her family relationship would be damaged if the father were permitted contact as sought. She conceded however that there would be no damage to their relationship if on contact, he "... *only played with him*", but went on to qualify that by alleging the father did not obey their instructions. She said that if contact were unrestricted "... *anything could happen*". By that she explained the father could show Patrick materials and behaviour that were inappropriate, that he would not follow their advice and would "... *lie to us about what happened during*" contact periods. Her resistance to unrestricted contact was manifest and unremitting.

88. The co-parent was open to resolution of the conflict through mediation which was a constant theme when giving her evidence. Whilst laudable in

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theory, it has been simply unworkable in practice given the hardened position 007-54 the mother and both the philosophical and ideological bases upon which each of the mother and co-parent predicated their case. Whilst she presented as more reasonable, understanding and moderate, in the final analysis her position was as promulgated by the mother.

89. The co-parent made it clear that she did not believe that a "... *father/son"* relationship was presently in Patrick's best interest. The basis for this, she explained, was the lack of trust between the parties which the applications had failed to address.

90. The co-parent said that she was committed to Patrick and the father having contact in the future but qualified that by saying that she did not believe, at the present moment, it was in Patrick's best interests. When asked what benefits would accrue to Patrick in the event of more frequent contact, she frankly responded by saying that "... *a more effective bond would develop between Patrick and the father"*. It was her view that the contact sought by the father was not appropriate because the "... *damage"* would be greater than the benefit. When she was asked what damage could possibly occur, she explained that what the father was asking for was a "... *total reality shift"* for Patrick who presently had a close parental relationship with the mother and herself, but not with the father. She said that to impose contact as sought would be extremely detrimental to Patrick.

91. One of the bases also for the co-parent's view that contact should only take place two to three times per year was her fear that the father would, at some time in the future, make an application for residence of Patrick. She said that she needed to be secure that Patrick would not be taken from her. As I have said, that is not a position I would accept as having a realistic platform in the current circumstances, and both the mother and the co-parent should, in the result, leave this court safe in the belief that as matters presently stand they are the acknowledged residence parents of Patrick and responsible for both his long term and day to day care, welfare and development.

92. The co-parent somewhat surprisingly, expressed a personal antipathy towards the father. She said that she found his behaviour at contact inappropriate and that his attitude towards her had caused "... *enormous pain"*. She asserted that the father had actively sought to exclude her from Patrick's life. There was no basis for that view and was inconsistent with the evidence of the father. Despite an evening break, the following morning the co-parent said that the father had caused her enormous pain and suffering and that his attitude to her could be seen from what was happening in the court room with a "... *total* 007-54 *concentration on the mother and marginalisation"* of her own role. She

complained that the father was prioritising the importance of biolog 007-55 parenting over that of psychological parenting. I do not see it that way and which view is also inconsistent with the evidence of the father which I accept. The co-parent made it clear that her position was that if the father was "... *a parent*", then the lesbian community would need to take that into account in the future. She added, and with considerable insight, that the rights of donors also required to be protected.

93. The co-parent said that if the court determined that the father was "... *not a parent*" but an "... *interested party*" (to use the term of Mr Udorovic), she would be satisfied in part and in the absence of an amicable agreement, the only issue then remaining was the quantity of contact.

94. It was her view that the contact orders last put in place were confusing and that to have contact greater than two times per year for three hours would "... *open the door*" to the father. She said that his proposal was an extreme acceleration of his contact with Patrick and that it should be built around a longer time frame. When it was suggested to her that a period of four hours each alternate Sunday was appropriate, she rejected that as being traumatising "... *for Patrick and our family*" given his present relationship with the father. She again fell back on her complaint that the father's behaviour, thus far, had not given her a basis for trust. In my view, her complaint was quite unfounded.

95. Mr Udorovic put to her that when Patrick was three years old and Father's Day came around, would she agree to Patrick seeing his father on that day? She agreed with that, but qualified it by saying it was dependant upon whether Patrick wanted to see his father. Additionally, and demonstrating a general reluctance to enable contact between Patrick and his father, she explained that she would be seeing her own father that weekend and it may well be difficult for her to arrange contact. In my view, to leave that decision to a child of three years of age did not demonstrate a responsible parenting attitude.

96. The co-parent was referred to Annexure C to her affidavit filed on 8 May 2001 which was a copy letter dated 19 August 2000 forwarded by her (and the mother) to the father. Paragraph 2 of that letter read as follows:

> "Given the level of acrimony and dispute between us and you, we feel it is inappropriate for you to buy Patrick a piece of clothing for his birthday, because we would find it difficult to utilise. If it is important to you to buy him a birthday present we suggest that you select an age appropriate toy, book or piece of music that you can bring to contact visits and take home with you when the visit concludes. Please ensure that the gift can be safely used in LD's

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living room, porch or front yard and that it does not present any health risks for Patrick". 007-56

97. The co-parent explained that at the time both she and the mother felt traumatised, but that the controlling attitude referred to in that letter was no longer held by her. She said, and fairly so, that the father could buy clothing and toys as "... *things have changed"*. I found that evidence encouraging.

98. The only concession in terms of contact made by the co-parent, was to say that she would have no difficulty with the father having contact with Patrick on four to six occasions per annum.

99. The father's attitude towards his contact with and parenting of Patrick was precise and credible. The father was sensitive to the assertion by both the mother and co-parent that they were not accorded respect by society as a same-sex couple bringing up a child. For that reason, and more, he agreed to them having day to day and long term care and decision making for the child. He observed that such an order was very important to them and hoped by consenting to those orders it would show his recognition and respect for them as Patrick's parents and demonstrate that he accepted the fact that his position was "... *one down"* from their own. I accept that evidence.

100. The father said that he had been very conscious of the need to introduce himself slowly to Patrick and gradually increase his interaction with him over the contact periods. He deposed, and which I accept, that Patrick had never shown any signs of distress in his presence. He further deposed that he had done his best to ensure the contact periods were a happy occasion for Patrick and against what he saw as considerable odds, often in a hostile environment. As he said in his Order 30 Affidavit "... *I have shown enormous dedication to Patrick and I hope it is evident that I am a fit and proper person to care for and nurture Patrick"*. It was his view that Patrick should not be in any doubt about his origins and the fact that he had a father who loved and cared for him. He saw his contribution as being "... *in addition"* to that made by the mother and co-parent and that he in no way sought to question nor undermine their role. He deposed that he had always wanted to be part of Patrick's life, and that despite the difficulties in his relationship with the mother and the co-parent that he would do all things necessary to make them feel comfortable with any contact arrangements and would support their role as primary care givers to the child. I accept that evidence.

101. During the period commencing 5 January 1998 the father has approached all issues with an open mind to compromise and has borne without dissent what may be termed harsh and onerous demands placed upon him by the mother 007-56

and co-parent. I have earlier in this judgment referred to a letter chronicling demands imposed upon him. The most stark evidence however of those demands may be seen from the affidavit of the mother filed on 30 May 2001. There, she deposed that the recollection of both the co-parent and herself of the agreements made in about March 2001, following a number of contact visits were: 007-57

"(i) the co-parent was to be present during the contact.

(ii) LD was to be 'available to Patrick' as we had defined her role in our 6 December letter to the father.

(iii) That he treat LD with more respect re: her role at contacts and the fact that it is her house.

(iv) That the father did not have any parenting responsibilities or rights, despite his claims, hopes and attitude. the co-parent and I held these responsibilities.

(v) That separation anxiety and stress related to contacts were real and serious issues for Patrick and Patrick's family.

(vi) No photos were to be taken at the contact on 4 March 2001. The father was extremely resistant to this agreement.

(vii) ...

(viii) the father to stay within fence line of LD's property in accordance with the orders. We were specifically instructed that the footpath and the nature strip were outside of the fence line.

(ix) No familial terms to be used in regards to the father and his family members' relationship to Patrick.

(x) No questions to the co-parent re: Patrick's life outside of contacts unless specifically related to Patrick's care during the contact.

(xi) All of LD's property is available during contacts, within reason, under the terms of the order. 007-57

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(xii) the father finds out more info re: child development in a way that does not increase his sense that he is or should be a parent.

(xiii) Attempt to 'normalise' experience for Patrick to reduce his stress and anxiety.

(xiv) That we all consider a referral for ongoing counselling due to the complexity of the situation.

(xv) That if the father did not change his attitude then chances of a positive relationship with Patrick were minimal.

(xvi) That Patrick needed a shorter contact time or a less stimulated environment in contacts. And that the constant focus on Patrick by the father and his guests, and the amount of unfamiliar toys, books, music, rugs, clothing, drinking cup, tape recorder etc. that he was bringing to contacts was unnecessary and contributing to Patrick and our stress.

(xvii) That the father takes responsibility for packing up and leaving on time.

(xviii) That the father establish a 'goodbye' ritual in last 1/2 hour of contact so as to avoid further confusion, stress and over-tiredness for Patrick.

(xix) That the father could bring his water bottle for Patrick's usage, but that he was simply to bring it out then make no further reference to it during the contact. He was to refrain from using the water bottle in competition with that provided by the co-parent and I. That it was not his role to provide for Patrick.

(xx) That the father could bring his rugs for his own personal usage, but was to ensure that they were clean and did not smell of his body-odour.

(xxi) That the father could bring a couple of toys with him, and that he was to make more use of the toys, books etc. that the co-parent and I provided. That he

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was again to refrain from engaging in competitive behaviour re: his toys books etc vs. those provided by us.

(xxii) That the father was to refrain from any competitive behaviour re: seeking Patrick's attention when Patrick was relating to the co-parent.

(xxiii) That all parties reduce the level of attention on Patrick so as to normalise the experience for him and reduce stress, tiredness, confusion etc.

(xxiv) That the father could take one photo only, if Patrick gave his consent for the contact periods on 25 March and 29 April 2001.

(xxv) That the father brings no guests to the contacts on 25 March and 29 April 2001, so as to assess the effect on Patrick and us.

(xxvi) That the father write down the agreements as he appeared to remember them differently to everyone else in the room and that he not assume room to move in agreements".

102. It was within the umbrella of those highly unusual and restrictive conditions that the father had contact with Patrick. Given his conduct during contact, those demands cannot, by any measure, be seen as reasonable. There is no evidence that he has ever erupted in opposition to those demands which may objectively be described as unrealistic and irrational, but maintained a desire to generate, at least from his part, goodwill with the mother and co-parent.

103. In the course of cross examination, Ms Mendes Da Costa asked the father how he perceived his role in Patrick's life. The father, and with some considerable passion, explained that he had come to court in the hope that he could have more reasonable contact with Patrick, adding that he felt he had been totally marginalised in the child's life. He said that Patrick does have some form of attachment with him and modestly added, "... *I'm very grateful for that*". He said that he wanted to be recognised as Patrick's father, "... *as his dad*". He wanted his friends and his family to meet Patrick who could benefit from interaction with them. He expressed a desire for Patrick to meet his own father, who is 87 and had not yet met the child. He said he saw that as "... *utterly cruel*". He said he wanted to contribute to Patrick's life, to take him to work to

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see what a TAFE college looks like, to the MCG and to visit his sister's place 007-60 *where kangaroos abound"*. He explained that he would like the opportunity to collect Patrick from kindergarten.

104. I have no doubt that the father too has suffered considerable anxiety and stress over the past events. He referred to a conversation he had with Mr Papaleo who expressed concern that the father would leave, given the little contact that he had. Mr Papaleo told him that what he was doing at the moment was for Patrick, and that "... *there's not much in it for you"*. The father then went on to explain that he now understood what Mr Papaleo meant. He said that there had been a temptation for him to "... *walk away"* and that friends of his had told him to "... *cut your losses"*. When giving this evidence I observed the father to be speaking with considerable passion. He said that he had not given up and that he had, and such is the fact, seen Patrick at every opportunity. He went on to say that he did not know how much more he could take and that he had come close to his limits. He said "... *I don't know how, but I have still managed to retain respect* (for) *the mother and the co-parent"*. He was referred to the fact that they had asserted he was dishonest and said that "... *was pretty hard to take"*. He also explained that he had generally been of the view that their parenting of Patrick "... *had been impeccable"*. So much so is clear both from his evidence, through Mr Papaleo and also from his letter dated 6 December 2000.

105. The father said that if the mother and co-parent's behaviour continued, then "... *I imagine they would not want me to have any involvement at school"*. He pointed out that he was a teacher and has knowledge of education. He desired to have some input into Patrick's education which would be in the child's best interests. It is not beyond the realm of ingenuity to provide a parent/teacher interview separately for both the father on the one hand, and the mother and co-parent on the other. Given rational and sensible co-operation on the part of the mother and co-parent, such an arrangement would not be intrusive of their family, nor of their parental responsibility for Patrick's education. As the father so plainly said, the only role he had in Patrick's life was that ordered by the court and without which he would have no role at all. He made it clear to Ms Glaister, in cross examination that the conflict originated because "... *I exist"*, and not from him. I agree with that.

4.3 THE ALLEGED AGREEMENT

106. The parties each gave evidence concerning discussions they had in various combinations that gave rise to their respective understanding of the role they were to play in the life of their prospective child. As between the mother 007-60 and the co-parent, the mother deposed they had decided in about July 1997

that she would carry the first child. The co-parent would carry the next ch 007-61 That was their common intention. She said that in about October 1997 they decided to initiate the process of locating a donor and in that month, then unknown to the co-parent, the mother advertised in a Melbourne newspaper for a 'donor/father'. The co-parent was uncertain about the proposed plans, and according to the mother, informed her that she did not know whether she could go ahead with the proposal. She said that her separation from the co-parent "... *could have been permanent*" but that it was only "... *time out*". She repeated that one of the factors that brought about their separation was the co-parent's concern and inability to come to terms with being a parent and that she, the mother, proposed to seek out a donor. In the result however, they separated on 16 December 1997 and lived in different households until 28 February 1998, being a separation of some two and a half months. The mother said that the proposal created a crisis in their relationship and that the co-parent was scared of being a parent in "... *a homophobic society*". It was the mother's evidence however that, notwithstanding the physical separation they were in constant contact and were "... *totally committed*" to each other.

107. As for the co-parent, she explained that at the relevant time she felt unable to make a 100% commitment to any prospective child by reason of the confusion she was feeling and that she was not prepared to make a long term commitment to their living arrangements. She said that she "... *was terrified*" and went on to explain, and compellingly so, that she wanted to be sure that any child would not be harmed being raised by parents in a same sex household. She said that she seriously considered the matter during their separation and concluded that the mother was the person she "... *loved*" and with whom she wanted a child. Furthermore, and significantly for my determination, she said that she had also accepted that the father would be an appropriate "... *donor/father*" for her own contemplated child. Her approach to the serious issue concerning the artificial insemination of the mother was thoughtful and insightful.

108. As a result of private communications or the advertisement in the gay newspaper the mother had a number of responses from would-be candidates. It was she alone however, who interviewed 'Richard' on 30 December 1997 and 'Michael' on 4 January 1998. Subsequently, and not as a result of the advertisements, the mother specifically sought out and invited the father to lunch at her home. In relation to that, the mother deposed that she interviewed the father on 5 January 1998. She did not go on to explain, in her evidence in chief, what took place on that occasion.

109. In his Order 30 Affidavit, the father deposed as follows: 007-61

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> "13. On 5 January 1998 the mother rang me and invited me to lunch at a house she was minding. On that day the mother asked me if I would be interested in being a father to her child, and in fact on that day she told me that when she first met me in 1989, she had always thought she would want to ask me to be the father, if she ever decided to have a child. She said she was delighted when she heard I was gay and said she liked my sister's children very much. She said she thought I was good genetic material".

110. It was the father's understanding, and such is the fact, that the mother was then separated from the co-parent and living in different accommodation. He said that the mother told him she proposed to go ahead and have a child with him, irrespective of the co-parent's plans. He was delighted to be asked and discussed the proposal in some detail with her. He said that he recalled informing her that he wanted to be known as the child's parent, to be involved on a regular basis and that he would like to have "*... the child for one or two days a week".* I accept his evidence that the mother was agreeable to this.

111. In her evidence before me, save for admitting the first sentence of par 13 to which I have referred, the mother sharply asserted that the rest of the paragraph was both a fabrication and a lie. She volunteered however that the father was "*bowled over*" that she had asked him to be a donor and in the course of his surprise, said words to the effect "*... my God I think I need a drink*". Curiously however, she went on to deny that he was delighted at the request as deposed by him.

112. The mother's evidence in relation to the events of 5 January 1998 emerged through the process of cross examination. She said that she asked the father, if in the event that she and the co-parent finally separated, whether he would be willing to be a donor to her as a single parent, and to which he was agreeable. She went on to add that the father said he would "*... love weekly contact"* and would propose to see the child on a weekly basis. However, she qualified that by saying "*... that meant he was available",* and that he was asking her if it was possible. It was her evidence that she said "*... we can't guarantee that".* That evidence is in sharp contrast to the father's affidavit where he deposed:

> "16. I recall telling the mother that I wanted to be known as the child's parent and be involved on a regular basis. I said that I would like to have the child for one or two days a week and the mother was agreeable to this ..."

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In the course of her cross examination, the mother denied both the statements. I do not accept her denial. 007-63

113. During the course of her evidence the mother was referred to her affidavit filed on 23 November 1999. In that affidavit she sought "... *the Court's indulgence in allowing to refer to the father as 'donor' as that is the basis upon which he became involved with me".* She then referred to the meeting of 5 January 1998 and had this to say:

> "7. ... I note that it was on 5 January 1998 that I invited him over for lunch. I did not ask him if he were interested in being a father to my child, but rather whether he would be interested in being a known sperm donor. It is correct that the co-parent and I were in the process of a trial separation at that time. I deny having said to the donor that I wanted to go ahead with having a child with him irrespective of the co-parent's plans. I indicated to him that the co-parent and I were most likely to resolve our issues but that in the unlikely event that we didn't I would proceed and be a sole parent. I said that the co-parent and I wanted to have children, and that I was interviewing donors. I deny that the applicant said to me he wanted to be known as the child's parent, but rather state that he told me he wanted to be known to the child. The donor indicated to me that he did not wish to be an anonymous donor. I acknowledge that and asked him what level of contact he desired. He responded he would like weekly contact, and I responded that could certainly not happen to begin with, and would ultimately be at the co-parent and my discretion. He asked if his role was to be as a 'co-parent', and I indicated this was not possible. I said, the only person I wanted to co-parent with was the co-parent. I deny that we made any agreement for the applicant to have regular contact with the child at this interview ...".

114. In his evidence, the father made it clear that it was understood he desired involvement in the care and support of any child for "... *one or two days per week"* and that he would be known as the father. He said that he made it very plain to the mother, when these plans were first discussed, that he wanted to take on the role of an actively involved father and to which there was no dissent. I prefer the evidence of the father to that of the mother. I have no doubt that had the situation been as deposed to by the mother he would not have 007-63

proceeded beyond their first meeting of 5 January 1998.

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115. The father deposed that he had always wanted to be a parent and in the past had contributed to the upbringing of five children. He said that he had treasured that experience. Following the proposal put to him by the mother, the father said that he considered the matter carefully, that he felt he was well-prepared to make such an important decision and discussed the issue with both family and friends. In his Order 30 Affidavit he had this to say:

> "174. I was prepared to make a long term commitment to be a father and was mindful of the considerable responsibilities that this involved. I considered the implications that this decision would have on my working and living arrangements and after seeking input from friends and relatives with small children and grown up children I made my decision with great joy and with the support of these same friends and relatives.
>
> 175. I considered such things as my lifestyle and my work, my dedication to my sport of cycling which demands long hours of training, my network of friends who had children or who were trying to have children. I considered my house, the renovations I was planning and whether I would want to continue sharing my house if I had the responsibility of a small child for some of the week. I discussed all of these things with close and trusted friends and continually came to the same conclusion: that I wouldn't be giving up anything because I wanted very much to have children. What I initially saw as compromises I would have to make, I recognised as minor inconveniences for something I wanted very much: the opportunity to contribute to the life of a growing and developing child."

I accept this evidence which was not challenged by either counsel for the mother or the co-parent.

116. Following the meeting on 5 January 1998 the father confirmed with the mother on 12 January 1998 that he was willing to undertake the process of artificial insemination. In furtherance of their discussions, and at the request of the mother, he attended the Sexual Health Centre to be tested for the HIV virus and any sexually transmitted diseases. By reason of his concern and consistent with the serious attitude with which he approached this obligation, he discussed

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the issue with RH on 18 January 1998. It was the father's evidence that RH was a donor/father and shared in the co-operative parenting of three children with a lesbian couple. When cross examined by Ms Mendes Da Costa, the father said that he relied upon his conversations with RH and the experiences he had in his own arrangement. He explained that those arrangements had changed over time and that overall, the general terms were that he would go to the mother's house, collect the children and they would spend one to two days with him. The father said that RH outlined his own financial arrangements and also explained the problems that the co-parent had within their family dynamics and which he subsequently discussed with both the mother and the co-parent.

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117. The father said that he also spoke to RH on 7 May 1999, during the mediation process and sought his further advice. The experience of RH, and which he relayed to the mother and the co-parent, was that the lesbian parents had difficulties after the child was born as the co-parent felt that her role was unclear and that she was uncertain about it. They too struggled over an appropriate description of terminology to be used. This was a difficult issue for the women concerned. In that relationship, the co-parent regarded herself as a mother.

118. When the father received the results from the Sexual Health Centre he met with the mother on 30 January 1998 and together with the co-parent attended a restaurant in Carlton to further discuss their plans. The father deposed that the mother and co-parent were beginning to see each other again and that the mother had informed him they "... *were being very tentative with each other".* It was the father's evidence they discussed issues such as who was to be present at the birth, immunisation, schooling, whether his name would be on the birth certificate and also the mother's fears about not wanting to be financially dependant upon him. He said that he again made it clear he desired to see the prospective child two days a week with which the mother agreed, adding that it would suit her as she wished to continue working. He said that it was the mother's view it was appropriate to agree upon a flexible arrangement as situations, such as employment, were likely to change over time, and it was more important that they achieved a good dialogue with each other and were able to discuss arrangements than make a binding agreement at that stage. It was also agreed, he asserted, that they would attend mediation to resolve any differences that may emerge between them. The father described the discussions as being friendly, celebratory and of a preliminary nature. He said it was agreed that they would have a three-way partnership where each of them was an equal partner to the arrangement and had equal parenting responsibility.

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119. It was at that meeting that the co-partner asked him if he would be the

father to her child. He said that he was "... *stunned and delighted*" at 007-66 request. It was agreed that if both the mother and the co-parent were to have a child, it would be desirable for the children to be related through one father. He said that he had some misgivings at that time about making a similar arrangement with the co-parent as he did not know her nearly as well as the mother and realised that he would need to know her a lot better before entering such an arrangement. Although he did not then voice those concerns to the mother or co-parent, he resolved to get to know the co-parent better with that in mind. I found that attitude to be conservative, appropriate and consistent with the father's insightful disposition.

120. The father deposed in his Order 30 Affidavit, and made it perfectly clear in his oral evidence, that it was understood at the meeting that he wanted to be involved in the care and support of any prospective child for one to two days per week. He said that he made it very clear to the mother, consistent with their initial discussions, that he wished to take on the role of an actively involved father. In the course of cross examination, the father said that it was the mother who asserted that they had known each other for a long time and that they were in agreement over almost everything. I accept that evidence. He said that he understood he was involved with a lesbian household, that any child would be part of their family, but that he would be regarded as the father.

121. At that meeting, the father made contemporaneous notes of the discussion which have been tendered in evidence. Those notes were found by him after the mother and co-parent had given evidence, which fact was announced to the court late in the afternoon of 25 January 2002. In my view, those notes are important for they provide some significant measure of corroboration of the father's affidavit and oral evidence.

122. The mother's evidence in relation to this meeting is quite different from that of the father. In her Order 30 Affidavit she deposed that they reached the following agreement:

"10. (a) the co-parent and I were the child/rens parents;

(b) his role was as a known donor, who would hopefully have some contact with the child/children at our discretion;

(c) the child/ren would not reside with him;

(d) he would not pay maintenance;

(e) his name would not be on the birth certificate and we would name th 007-66 child/ren;

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(f) as the first birth mother it was my decision as to who would be at the birth and he would have no ante-natal role;

(g) he would not have long term or day to day decision making responsibilities;

(h) conception would be by way of artificial insemination;

(i) that he would undergo a fertility test;

(j) that he would practise safe sexual practices in his own life during the process;

(k) he gave a commitment to being donor for two children one that I was to bear and one that the co-parent was to bear".

123. In the course of her evidence before me, the mother said that she had prepared a written agenda for the meeting, but that she never showed it to the father and nor was a copy ever retained by her. A similar document was prepared, she said, at a meeting alleged to have taken place on 17 October 1998. It was also her evidence that they all reached a concluded agreement on 30 January 1998 which was identical to an alleged subsequent agreement of 17 October 1998, save that the father was not to be present at the birth. I do not accept that evidence.

124. In her affidavit and oral evidence before me the mother portrayed the father's role as a minimal one, or indeed, one of disinterest. For example, in her affidavit filed 26 May 2000 she deposed that the father "... *showed little initiative in researching the practical, emotional and legal implications of his role as a donor*". I reject that the father displayed an attitude of disinterest. The mother went on to say that he may have spoken to a friend of his who was a donor called RH. I reject that evidence too, for I am satisfied that the father spoke to RH, sought his advice and experiences and which he actively relayed to the mother and co-parent.

125. As to the process of artificial insemination itself, the mother had this to say:

> "21. When I met with the donor for the insemination process, we talked about the weather and general things. **We did not talk about parenting** as he was not a co-parent. We did not talk about the co-parent and my relationship nor his relationship with the children. All of this was understood having been

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agreed prior to the insemination process commencing". (Emphasis added)

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That evidence, as I see it, was given by the mother in support of her contention that a firm agreement had been reached by 30 January 1998 and that there was accordingly no need to discuss the parenting issues any further. I reject that evidence, particularly in the light of the father's evidence of events that occurred during the artificial insemination process and to which I shall shortly refer and moreover, his general approach to the process and his attitude to which I have already referred.

126. It is common ground that the first private insemination session took place on 31 January 1998. The co-parent was not present. In February 1998 the mother (but in the absence of the co-parent) attended a support group meeting for prospective single lesbian parents. Ms G was present at that meeting along with the mother and two other prospective single lesbian parents. Ms G said that the mother openly discussed her recent insemination with the father, and referred to him as a long term friend with whom she had much in common. She described the father as having an active role in the life of their prospective child, that he would develop a friendship with the child and provide child care. She said, and consistent with the evidence of the father, that he may utilise the opportunity to care for the child in the event she returned to work part time. Further, Ms G said that the mother informed them that she and the co-parent, who were resuming their relationship at that time, were to be the primary carers and co-parents. It was her view that the mother described the situation both "... *happily* (and) *enthusiastically*". In the course of discussion at the meeting, Ms G enquired of the mother why she had not contacted the father sooner, given that she had known him so long. The mother said that originally the co-parent had not been "... *that keen on the father as a 'donor'*", but indicated that was no longer the situation.

127. As to that meeting, the mother said that she may have said that the father was "... *a friend*" and that they "... *had some things in common*". She said it was false to suggest she described the father as having an active role in the potential child's life. I reject that evidence. She admitted she said that she hoped he would develop a friendship with the child, but denied any suggestion that she said the father would provide child care. She said that the father "...*may be willing*" to utilise that care in the event she returned to work. She otherwise agreed to the further matters sworn to by Ms G.

128. I accept the evidence of Ms G who I found to be an impressive witness. She had an excellent recollection of the events and was both thoughtful and reflective in the giving of her evidence. There was no reason advanced why Ms

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G would be untruthful. Her description of the meeting, the mother detailing her friendship with the father and his role in the life of the prospective child are significant to my determination. 007-69

129. The mother and co-parent resumed cohabitation on 28 February 1998. Given that the attempts of artificial insemination had proven unsuccessful at that stage, the father, at the mother's request, attended a hospital for semen analysis on 20 March 1998.

130. In the course of his evidence, the father described events concerning the artificial insemination process itself. He said that they all enjoyed an excellent relationship, that he felt it was an arrangement with "... *a close friend"* which had been reciprocated. It was his evidence that they would hug and kiss at the front door of his home, occasionally he would cook a meal and they would eat together. The father deposed that during the period of artificial insemination both the mother and he enjoyed an easy rapport and discussed many issues at their meetings. He said the mother was most helpful in advising him about catering for the needs of a child when planning renovations he proposed to make to his home, that she suggested ways in which the kitchen could be laid out so that he could easily watch over the prospective child whilst preparing meals, and discussed matters such as education and the way he could contribute to the child's future. I accept the father's description of those events which were not challenged in cross examination.

131. In his Order 30 Affidavit, the father deposed that he would not have gone through this "... *exhausting and time consuming process"* if he had been merely a donor for the mother. It was and continued to be, he deposed, a sincere commitment. In his affidavit, he had this to say:

> "29. My life is busy but I was well aware of the commitment I had made to becoming a father and I entered into this agreement with the mother and the co-parent thoughtfully and conscientiously. I had wanted to have a child for a long time and did not see it as giving up anything in order to take on the role of a parent. I believed then and believe now that I have an important and significant contribution to make to the life of this child and would not have remained involved with the mother and the co-parent through such a demanding process had I seen my role as entirely 'at their discretion'."

I accept that evidence. 007-69

132. The father travelled overseas to compete in the Gay Games at Amsterdam in August 1998. Upon his return in October 1998 the mother telephoned him and arranged for them all to meet at a cafe in South Yarra. From there, they went to dinner. That social event took place on 13 October 1998. There had been no artificial insemination following the return of the father from overseas and the date of that meeting. It is common ground that the last artificial insemination before the father travelled overseas was on 19 July 1998 and the next occasion took place on 15 October 1998. There was no discussion of substance at that meeting save that the father said the mother was concerned he may not wish to resume the process of artificial insemination. He said that he did wish to continue and that both the mother and the co-parent were pleased with his decision. A postcard was written by the mother and co-parent to the father in the following terms and which the father claimed was received by him shortly following that meeting:

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> "Dear (the father)
>
> Thanks for a great evening the other night. I hope you are feeling more at ease – we are! Found these articles recently – more use to you than us. Keep safe & happy – see you again soon.
>
> Love (the mother) & (the co-parent)"

133. It was the mother's evidence that the parties had a "... *further meeting to discuss the progress and concerns"* they had as to the father's attitude and behaviour. They alleged that the meeting took place on 17 October 1998. The father denied there was a "*meeting*" as deposed to by the mother and the co-parent. He said, and such is the fact, that on that day a further artificial insemination took place. In relation to that meeting, the mother deposed that their concerns were:

> "12. ...

(a) his role as a biological father being that of a 'special person in the child's life' rather than a parent;

(b) his understanding of our wishes and concerns;

(c) the amount of contact the father would have;

(d) the father not being present at birth.

> We asked him to reaffirm the agreement made in January."

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134. When cross examined by Dr Kovacs, the mother was referred to the paragraph and said, as I understand it, that the meeting came about as the co-parent felt the father was ignoring her and focusing too much upon the mother. Further, he had been making certain comments during the artificial insemination process. At one insemination she alleged that the father said "... *I can't stand my work I just want to stay home and look after the baby"* and which she took as a joke at the time. She also alleged he made a further comment that a friend had told him he should be present at the birth. Neither of those matters were detailed in her Order 30 affidavit. Later, in the course of cross examination the mother said she was concerned about those comments, that they did not make sense "... *in the light of our agreement"* as a result of which she called the further meeting. She went on to say that the father entered into the arrangement:

- because he did not have a heterosexual partner;
- that he wanted some contact with a child with whom he was biologically connected;
- that he wanted to pass on his genetic material, and
- if he could build a trusting relationship with them, he could have some sort of relationship with the child.

135. The mother's evidence was that they came very close to discontinuing the artificial insemination procedure due to her concern about the father's attitude. It was, she claimed, only after his reassurances to both herself and the co-parent of his understanding that the arrangement was the same as their own that she decided to continue with the process. On 3 January 1999, the mother's pregnancy was confirmed.

136. In coming to my determination on this difficult issue in dispute, I prefer the evidence of the father to that of the mother and co-parent. I have earlier set out a number of reasons why this is so. In addition, there are other factors involved relevant to this particular issue. Firstly, it was on 17 October 1998 that an artificial insemination took place. Given the sensitive circumstances surrounding such a process I do not accept that the parties would collaterally entertain a discussion of the nature alleged which would have been both anxiety provoking and stressful, particularly given the father's understanding of the arrangement that had been met earlier in the year. Secondly, the post card forwarded by the mother and co-parent to which I have referred is in my view more consistent with there having been a dinner than a discussion which would

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have struck at the very epicentre of anxiety and the father's motive to continue the process. There had been no artificial insemination from 19 July 1998 to 15 October 1998 and one can well understand any concern felt by the mother and co-parent as at 13 October 1998 that the father may have not been as enthusiastic.

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137. Finally in the course of submissions, Dr Kovacs made much of the fact that Mr Udorovic had failed to cross examine either the mother or the co-parent on par 22 of the mother's affidavit filed on 26 May 2000 which referred to this alleged meeting. In his submission, Mr Sweeney correctly pointed out firstly that that affidavit was not relied upon by either of the applicants and secondly, that the father had denied the allegation in any event in his affidavit filed on 2 June 2000.

138. In dealing with the evidence concerning the alleged agreement of January 1998 I do so on the basis that it does not confer binding parental rights upon the applicants, nor does it define the particular status of the father pursuant to the provisions of Part VII of the Act. It is not binding upon me in the event that I find that its terms did not advance Patrick's best interests. The terms of any such agreement could never prevail over determinations by the Court. It is the considerations in s 65E and s 68F(2) of the Act, rather than the terms of the agreement which dictate Patrick's outcome.

139. Dr Kovacs submitted that the parties were not of one mind and that there was no appropriate process put in place by them for arriving at an agreement given what she described as one informally convened on 30 January 1998, and "... *perhaps*" a second occasion on 17 October 1998. The issue of the discussions that took place on 5 January and 31 January 1998, whilst not binding, is relevant in assisting me to understand the intention of the parties at the time and also has ramifications extending to credit issues.

140. I have, in the course of this judgment, made findings as to whose version of events I accept in relation to the conversations of 5 January, 30 January and 17 October 1998. In coming to my determination, I was also assisted by considering the various events that occurred both between those dates and subsequently thereto. I have found in favour of the father, and in particular, I emphasise my finding that the father would not have entered into the onerous, time consuming and emotionally challenging period of artificial insemination had it not been for the assurances of both the mother and the co-parent as found by me. These proceedings underpin the need for parties undergoing this procedure to consider a written agreement describing the rights and obligations of each of them which can assist in avoiding, pre-empting and resolving interpersonal disputes.

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4.4 EVENTS FOLLOWING THE PREGNANCY

141. I have earlier referred to the fact that the mother announced her pregnancy on 3 January 1999. In the agreed chronology, it was common ground that the parties attended a dinner to celebrate the pregnancy on 5 January 1999. In his Order 30 Affidavit the father described it as a "... *celebratory*" dinner at a restaurant. He said that it was a pleasant evening, that they were all in high spirits and that he felt "... *somewhat incredulous that what all we had wanted so much was at last coming true*". He said that the mother and co-parent "... *both kindly*" asked him what sort of involvement he desired during the course of the pregnancy. That was denied by the mother in the course of cross examination. In her Order 30 Affidavit, the mother made no reference whatsoever to a dinner, but baldly asserted that the co-parent and herself met with the father to advise him of the pregnancy. In my view, that hardly described the reality of the occasion. In her evidence the mother reaffirmed that she would not have continued with the pregnancy without the terms, as outlined by her, being absolutely clear. She then, and from my observations, reluctantly so, described the dinner as a celebration, but said they did not talk about his role as a father. She went on to add that it was not clear what role he was to have, but it was to be somewhere "... *between a traditional role and a donor*". I accept the father's evidence of what occurred on that occasion.

142. I have earlier referred to the evidence of Ms G. It was her further evidence that the same members of the prospective single lesbian parents met again at an informal meeting at the home of the mother and co-parent on 31 January 1999. In relation to that meeting, Ms G had this to say:

> "2. ... the mother discussed the inclusion of the father in news of her conception, 'their' (ie all three's) happiness at news, concerns re: miscarriage and reaffirmed the father's role as actively involved in pregnancy (considering him in corridor while birthing) and post birth, helping at home maybe even moving closer (the father's request which seemed acceptable)."

143. In the course of her evidence, the mother did not challenge the fact that a meeting was held on 31 January 1999. She did not agree that she reaffirmed the father's role as being actively involved in the pregnancy but qualified that, when pressed, by saying that she did not remember mentioning the other matters to which Ms G referred. As I have earlier said, I found Ms G to be a most impressive witness and I accept her evidence. This, in my view, also stands sharp contrast to that asserted by the mother and co-parent that a firm

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agreement had been reached in the terms stated by them as at 31 Janu 007-74 1998. Given that which I have heard, I am satisfied that the mother said at that meeting that the father would be actively involved both in the pregnancy and following the birth of the child. Although not then firm in her view, she was going to give further consideration to his being present in the corridor at the birth. Further, she envisaged that he would assist her at home and that a request by him to adjust their accommodation appeared appropriate.

144. The father deposed that both the mother and co-parent requested that until after the twelfth week he only informed his friend RF, his own sister and "... *perhaps one other person"* that the mother was pregnant. They were all invited to a function at the home of RF on Sunday 28 February 1999. It was at that function the father announced that (words to the effect) "... *the mother and I are having a baby"*. In his evidence, he said, and frankly, that he thought at the time that was not "... *the right thing to say"*, that he did not intend any disrespect to the co-parent and apologised to them at a subsequent meeting on 8 March 1999. When cross examined by Mr Udorovic, the mother said that RF was known to her. She agreed that her pregnancy was announced at that function but went on to add, that at the time she was apprehensive about the security of the agreement she and the co-parent had with the father. She said that she was happy and proud for everyone to know she was pregnant and that it was apparent to her the father was also both delighted and proud. She also added that she "... *contemplated"* he was excited by reason of the pregnancy and the distinct possibility of his having a trusting relationship with the mother and co-parent as a reality.

145. The meeting held at the home of the mother and co-parent on 8 March 1999 was significant in that each of the father on the one hand, and the mother and co-parent on the other hand, gave quite starkly differing versions.

146. The father said, amongst a number of matters, that they discussed various issues including expenses, education, whether or not his name would appear on the birth certificate and such details as whether he would pay for shoes and put money aside for education expenses. He made contemporaneous notes at that meeting which, as I said, were discovered by him after the commencement of the proceedings in court. Those notes are revealing and substantially corroborate his evidence.

147. In his Order 30 affidavit, the father deposed that everything was fine at the meeting until the mother said that she did not want him to be present at the birth and that they did not want him to come to the hospital at all. He went on to depose that:

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> "42. ... Instead they proposed that after the mother went home, within a day or two I would be invited to their house for a special ritual of my own where I could bring my mother or sister and/or a couple of friends.
>
> 43. I recall asking what prompted this change of heart and the mother and the co-parent told me they were fearful of their dealings with the medical establishment and that they had gone to a lot of trouble to develop good relationships as a lesbian couple with their doctor, their mid wife and the staff at the Birthing Centre. They were concerned that my presence might harm those good relationships.
>
> 44. The co-parent and the mother emphasised the importance of my involvement in our child's life. The co-parent assured me I would be the first she would telephone after the baby was born, just as I had been the first person she had informed when they found out the mother was pregnant. Both the co-parent and the mother proposed that I should have a special occasion immediately after the birth when I could bring my mother, my sister and one or two close friends.
>
> 45. This was an option instead of attending the birth. They asked me how I felt about this proposal and their change of heart and I said that I was unsure and would need time to think things over ..."

148. In his evidence the father said that the meeting on 8 March 1999 took place over a period of two to three hours and that his contemporaneous notes outlined some of the matters discussed. He described it as a "... *social laid back afternoon sitting in the sun*". He said that the issue of his not being present at the birth was carefully put by the mother and the co-parent and that he was stunned by what they had to say in relation to that important aspect. However, he made it clear that the only disagreement they had at that meeting was his presence at the birth. His state of mind was that there had been an agreement on many significant issues. I accept the father's evidence of that meeting.

149. It is common ground that on 11 March 1999 the co-parent telephoned the father to inform him that the mother had been accepted into the (Birthing Centre). It is clear to me from the totality of the evidence, that the father's exclusion from the birth process was a matter of deep and serious concern to

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him and was, as he saw it, contrary to that which he had been earlier led believe would take place. In the course of cross examination by Ms Mendes Da Costa he said he was surprised at what the mother said about him not being present at the birth. It was his evidence that she said (words to the effect) "... *no, you're not listening, we don't even want you to come to the hospital*". He said that it was clear then that things had taken "... *a pretty bad turn*" and he was surprised that the decision had been made so long before the birth. He agreed that his presence at the birth was discussed at the meeting on 31 January 1998 and agreed that the mother said it was ultimately to be at her discretion. However, I am satisfied that he was led to believe on that occasion that he would have a role, being one that was very important to him.

150. The assertion by the mother and co-parent that they did not want the father present at the birth of the prospective child heralded the first note of warning, so far as he was concerned, of their hardening and restrictive attitude. This was despite, on his own version of the events, their alternative proposal that he should have a special occasion at their home immediately following the birth. On 13 March 1999 the father rang the mother and co-parent and said that he would like them to reconsider their decision concerning his attendance at the birth. I accept that they arranged a time to meet in order to discuss this issue and that subsequently the mother telephoned the father, said that she wanted to think things over, that she did not want a meeting and wanted to engage a counsellor or mediator. This surprised the father as, prior to attending the mediation, he said that there had not been any suggestion that his relationship with the mother and co-parent was of any cause for concern. In his Order 30 Affidavit, the father deposed that it was his understanding they were all going to consult a mediator only because of his concern at being excluded from even visiting the hospital at the time of the birth.

151. At the first session of mediation with Mr Madden on 14 April 1999 the father was handed a proposed agreement which provided for all contact to be entirely at the discretion of the mother and the co-parent but which, on the husband's version of events, did not reflect the discussions that had earlier taken place between them. I accept his evidence that he would never have entered into the arrangement if he was not involved in the general upbringing of the child. The proposed agreement vested entire control of the prospective child's future in the hands of both the mother and co-parent. It purported, on the husband's evidence to include provisions outside what he alleged to be the agreement reached in January 1998. For example:

> "6. Each party acknowledges & agrees that the donor provided his semen for the purpose of said artificial insemination & has done so in the clear understanding

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that he would not demand, request or compel any Parenting Responsibilities with any child born from the above said process."

152. There was no agreement reached at that meeting and following a second session of mediation on 21 April 1999 the parties became quite polarised in their respective positions.

153. I have earlier in this judgment set out the principal background events. I accept the father's evidence that, not having heard from the applicants following their cancellation of the third session of mediation, he wrote and also caused his solicitors to write to them. The position is clear that the mother and co-parent decided upon a course to sever their connection with the father, and went to extraordinary lengths to do so. They were intent upon distancing him from the birth. I accept the father's evidence that all his attempts to contact them were otiose and he was left with no alternative but to utilise the assistance of other services. The conduct in which the mother and co-parent engaged upon brings no credit to them, given all that the father had undertaken and his generous co-operative support following the first meeting of 5 January 1998. In the result, he was obliged to resort to the institution of court proceedings and without which, I have no doubt, he would have been prevented from participating in Patrick's life at least until Patrick had the cognitive skills to enquire about his paternal parentage.

4.5 THE ISSUE OF STRESS ASSOCIATED WITH CONTACT

154. Each of the mother and the co-parent have a documented emotional fragility, each has a psychiatrist and in addition, they jointly engaged a third psychiatrist for their mutual assistance. There is no evidence that the father has required psychiatric assistance. That of course is not to say that he has not, for such is the fact, also suffered considerable stress and anxiety arising from the course undertaken by the mother and co-parent and particularly following the institution of proceedings.

155. It is within the background of these proceedings that the stress suffered by the mother and co-parent should be viewed, and the reality of its impact upon Patrick in terms of their effective parenting of him.

156. In her Order 30 Affidavit, the mother has made a number of references to the stress suffered by both herself and the co-parent. It was despite the stress suffered by them and documented in earlier affidavits filed in the court that consent orders were entered into on 2 June 2000. The mother deposed that by finalising the proceedings the co-parent and herself had hoped that they could

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manage the contact upon which they had agreed. After 13 episodes of contact she filed an application in the Federal Magistrates Service on 8 May 2001 to discharge those orders. The basis for that, she deposed, was concern for their family. Contact was reinstated by court order on 11 July 2001.

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157. The mother deposed that she and the co-parent were very distressed by the contact and Patrick's alleged reactions to it. She said it placed enormous stress upon them individually, upon their relationship and upon their family unit. In order to assist in dealing with the issues involved, they commenced consulting Dr Neil Coventry in May 2001. The mother deposed that this assisted their relationship and the family, but did little to overcome their concerns regarding contact. The mother said that she had been incredibly stressed by the contact that had taken place. She went on to depose:

> "33. ... I feel that my and the co-parent's views as to Patrick's welfare, as Patrick's parents, are not being taken into account at all by the father, and in fact are largely disregarded. He continues to act as if he is Patrick's parent rather than a sperm donor that enabled Patrick's conception. I feel that he completely disregards the co-parent's role in Patrick's life even though he consented to an order that she have joint responsibility, with me, for Patrick's care welfare and development".

158. There is no objective and reliable evidence that Patrick has exhibited signs of stress (in the past) both prior to and following contact. It appears to me that the problem clearly and squarely lays at the feet of the applicants, but more particularly that of the mother. That about which she complains as the core of her stress is irrational for I am satisfied to the requisite standard of persuasion:

- that the father has a sensitive and genuine regard for the views of the mother and co-parent;
- that he takes their sensitivities into account;
- that their views are respected by him and not disregarded, and
- that rather than hinder, he has actively promoted and encouraged in a genuine and honourable manner the role of the mother and co-parent.

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159. The mother deposed that her ability to support Patrick "... *through distress"* was hampered by his age and her own distress. Without articulating why, she said that she found it difficult to support Patrick through contact periods with his father (in her affidavit, described as "*his donor*") given his age and that his verbal and cognitive skills are limited. She deposed that she cannot help Patrick feel safe when the co-parent and herself "... *feel so threatened by the situation that contacts have placed"* them in. Setting aside the highly emotive terminology, in my view, that is a matter for them and ought not be visited upon the father. I have no doubt it can be handled with associated and continuing therapy.

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160. In terms of the stress generated upon the mother, she deposed in her Order 30 Affidavit that Patrick's contact with his father attacked the boundaries of her family and placed Patrick in the centre of extreme and ongoing conflict. She deposed:

> "44. ... I cannot cope with Patrick and our family suffering due to the contact taking place. We have tried to make the contact order work but have found it impossible. Forcing our son to have contact with the father at this point of time is simply not working. Forcing our family to have contact with a donor who wants to be a father and who believes there is something missing from our family is not a solution".

161. Firstly, I reject that the mother and the co-parent have used all their best and genuine endeavours to enable the current order for contact, or indeed, the orders of 2 June 2000 to operate as they were intended. In my view, they have acted, but more particularly the mother, in the pursuit of their own rigid view of the father's limited role repeatedly advanced in the affidavit material and in court. To suggest that they were *"forcing"* Patrick to have contact is a gross overstatement. I am satisfied on the evidence that Patrick enjoys contact with his father and his friends. So much so is made clear from a video recording of a contact period which was tendered and the compelling evidence otherwise given by and on behalf of the father.

162. Another basis advanced for the mother's stress was that the father ignored agreements that she believed had been reached and that he continued to behave towards the co-parent and herself as he had "... *prior to orders being made"*. She deposed that:

> "48. ... He refuses to accept the co-parent's role in Patrick's life and disregards our views as to what is in Patrick's best interests, clearly believing that he knows

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> what is best for Patrick, even though he has contact only for a short period every three weeks ... In addition the co-parent and I are certainly not coping with what we continue to see as an intrusion on our family life. The reality, as we see it, is that the father as (sic) a sperm donor who enabled me to conceive but that we are Patrick's parents. We do not believe that at this stage in Patrick's development he needs to have a relationship with the father and, in fact, we see that relationship, at present, as detrimental to his ongoing welfare and to the welfare of our family. It is disruptive and causes enormous stress to the co-parent and myself and to Patrick".

163. I have given my most earnest consideration to the complaints of the mother. In relation to several of the matters to which she deposed,

- I reject that the father has refused to accept the co-parent's role in Patrick's life. Such was and has never been the case. His consent to the orders of 2 June 2000 clearly heralded his acceptance of her role and his ability to take advice from Mr Papaleo of how best to resolve any conflict in the best interests of Patrick.
- I reject that he disregards their views at to what is in Patrick's best interests. He has been compliant to a controlling set of directives, the likes of which I have rarely seen in this court. It is for the mother and the co-parent, and again, particularly the mother, to understand that the limits sought to be imposed by them are, on any realistic and objective basis, unnecessary.
- I reject the evidence of the mother that the father clearly believed that he knew what is best for Patrick. He has at all times sought advice in a sensitive and understanding manner.

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- The fact that the applicants see the

> father as an intrusion into their family life is a matter for them. The reality is, he is not.

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164. The mother deposed that she has seen Patrick distressed by contact. She had this to say:

> "36. ... During the period March 2000, when contacts every third week began, to April 2001 when they ceased, Patrick has been ill 14 times. Eleven of these illnesses have coincided with identifiable stressors (scheduled contacts, significant litigation periods and communication with the father)".

165. She further deposed that from February to April 2001 contact periods transformed Patrick for over a week "... *into a different child*". She said that Patrick became extremely distressed before going to sleep and that she and the co-parent were "... *forced to manage this through up to one and a half hours of controlled crying and comforting every time he went to sleep*". She said that Patrick became terrified of the co-parent or herself leaving him and would awake screaming during the night, asking for them. His nap times were reduced and he became clingy. She deposed that Patrick said he was "... *scared*" approximately 20 times per hour. In relation to that, she deposed:

> "41. ... He was 'scared' of any sound that resembled a motor bike (trucks, cars, lawn-mowers, planes, motor bikes and helicopters); 'people' coming through the door; people taking photos; the sight of a red motor bike that was similar to the father's; the postman on his motor bike; men wearing a cap like the father; and eventually any mention of 'the father' or even 'people'. The anxious behaviour that followed contacts also started occurring if we saw, spoke on the telephone or mentioned LD or LD's house ..."

166. The co-parent too deposed that she found contact periods intrusive, she said they were disempowering as they disrupted her sense of being Patrick's parent. She further deposed:

> "13. I feel exhausted and emotionally drained by the contact periods, the litigation and the stress of the last three years ..."

167. In her evidence before me the mother said that substantial contact would destabilise her relationship with the co-parent and further, that it meant she was

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at risk of separating from her. She went on to say that her concern was that the "... *stress would be enormous and I would go crazy*". When it was put to her whether that meant she would be unable to parent Patrick, she replied "... *that's possible*". On the other hand, the co-parent said that her "*primary objection*" to contact as proposed by the father was the lack of trust. That is why, she said, she sought further counselling.

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168. Dr McCausland has been the treating psychiatrist of the co-parent since February 2000. He said that she had a relatively mild depressive illness in her early 20's, which was resolved with treatment. He was consulted by the co-parent concerning relationship difficulties. When first consulted, he said that the co-parent suffered an adjustive disorder, depression, anxiety and sleep disturbances. Significantly for the purpose of my determination, he said that at present her parenting abilities, despite her symptomatology "... *have been unimpaired*". He said that she has a determination to overcome those symptoms. He has treated her with anti-depressant medication, for insomnia anxiety and otherwise offered supportive psychotherapy. He has seen some improvement, which in my view is significant.

169. In his report of 24 May 2000, Dr McCausland had this to say:

> "...
>
> In relation to the effect of court proceedings on the co-parent , it is clear that it has been experienced as a highly stressful event. **She is however, receiving effective psychiatric treatment and has considerable personal resources which, with support, will in all likelihood lead to a complete recovery.** As such I believe her prognosis is excellent and that the co-parent 's determination to confront her difficulties highlight the dedication she has displayed in relation to her role as Patrick's parent". (emphasis added)

170. In his report of 28 May 2001 Dr McCausland said in relation to improving the co-parent's psychological wellbeing that he strongly supported a review of current contact arrangements. It was his view that those arrangements contributed greatly to the perpetuation of the co-parent's psychological symptoms. He also said that the co-parent and mother have shown a great commitment to "... *maintaining their family unit*" and that ongoing contact may erode their confidence in the future. Specifically in relation to the co-parent however, I am satisfied both from the reports of Dr McCausland and his evidence that despite its relative chronicity, she will be able to cope. I also take into account that in the giving of her evidence the co-parent presented as determined and thoughtful.

007-82

171. I have in the course of this judgment earlier referred to the evidence of Stafraci. In coming to my determination I take into account his two reports of 22 May 2000 and 22 May 2001, together with his evidence before me. He was the treating psychiatrist for the mother and was first consulted on 23 December 1999. 007-83

172. He reported that the mother feared that the father's "... *intrusive*" presence in her family would not only impact upon her ability to parent effectively, but would also harm her relationship with the co-parents. In his second report Dr Stafraci said that the mother tended to experience anxiety and depression episodically which was associated with contact visits. Importantly, he opined that there was no impairment to her functioning or parenting ability.

173. In his evidence before me Dr Stafraci said that the mother was very securely attached to Patrick and experienced confidence in that role. He said that as things presently stood, and with his assistance, the mother has coped with the stress and that her relationship with the co-parent was not fragile but was very strong. He also said each of the applicants had a very strong commitment to the other. It was his view that it was as strong as you would expect in the circumstances and was now no longer an issue. The mother is no longer treated with medication and although her symptoms initially fulfilled the criteria of an adjustment disorder, this had now been resolved. When asked by Dr Kovacs whether a regime of more frequent contact was something with which the mother could not cope, he replied, and confidently, that he would like to think she could "... *adjust to anything*". Significant to my decision is the fact that he did not say that the mother could not cope with additional contact.

174. Finally, in his report of 22 May 2000, Dr Stafraci pointed out that as a same-sex family the identity of the mother and the co-parent as a new family was, at best, fragile, not only in regard to their self image, but also in relation to their interactions with extended family and the broader community. In his evidence before me he said that the "... *family is in fact strengthening*" despite the proceedings.

175. I found the evidence of Dr Stafraci to be most helpful. I accept, given all that I have heard that the mother does suffer stress over contact and certainly by reason of these proceedings. However, despite all, her position has improved and I am confident that now a final and determinative decision will be made following a lengthy and detailed hearing, her position will continue to improve.

176. I have earlier detailed evidence of the mother and the co-parent concerning the impact contact allegedly had upon Patrick and his own levels of 007-83

distress, if any. In considering this issue I have been alert to the receipt of evidence of observations made by others during contact or otherwise those of Dr Adler.

007-84

177. In relation to Patrick's development, Dr Adler made a number of important observations of the child in August 2001 and upon which he made specific findings. None of those observations or his conclusions as to Patrick's development were challenged. He reported that Patrick was an attractive, developmentally advanced two year old with excellent language skills for his age. He said:

> "My own observations suggest that Patrick is thriving and is developmentally ahead of his expected milestones. He appears to be a temperamentally 'easy' toddler who has a secure attachment to his co-parents. Nothing that I have read or observed suggests that there are any problems in the relationship between Patrick and his mothers. He is clearly familiar with the father and is friendly towards him to the extent that one might expect given Patrick's age and the frequency of their contact over the past 22 months. During the relatively brief period that I observed Patrick with the father there was nothing untoward in the father's behaviour towards Patrick. On the contrary, he interacted appropriately with Patrick and appeared sensitive to Patrick's needs and the sensitivity of the situation."

178. Dr Coventry provided reports dated 4 June 2001 and 17 December 2001. I have regard to those reports in coming to my determination. He has continued to see the mother and the co-parent since May 2001 for counselling arising from their anxiety over the father's contact with Patrick. That was the purpose of his engagement. He did not have any consultation with the father, and all information relied upon by him was conveyed by the applicants. He had not read the substantial Order 30 Affidavit of the father.

179. Dr Coventry reported that it was important to understand the anxiety of the mother and the co-parent from their perspective namely:

- that the "... *interim access decision*" destabilised their family unit,
- that it did not recognise their role as Patrick's parents, and
- that they feared the father wanted to have the same rights and contact as a

007-84

biological father in a separate heterosexual family. 007-85

180. Dr Coventry said he was impressed with the ability of the mother and the co-parent to consider what was in the best interests of Patrick and made a number of recommendations which were set out in his report of 17 December 2001. He concluded that the current arrangements for contact impacted upon their "... *parent role*" and was not therefore in Patrick's best interests. However, having heard all the evidence over nearly two weeks, I do not share his view.

181. There were a number of problems with what Dr Coventry had to say, none the least of which was that he had no consultation with the father or access to his evidence. He acknowledged that, and in fact wrote to the father asking whether he would be prepared to confer with him. Following legal advice, and for good reasons, the father chose not to do so. Furthermore, it appears to me that Dr Coventry had accepted with little or any qualification that which he was informed by his patients. I do not see him as being objective in the circumstances and that was particularly reinforced by his recommendations which I shall deal with later in this judgment.

182. When cross examined by Mr Udorovic, it was made clear by Dr Coventry that he was consulted by the applicants about their stress and concerns for Patrick over contact. He said that his focus was upon concerns they had about their relationship with each other and distress over contact. In relation to the latter, and significant to my decision, was his evidence that although still considerable, their level of distress in this regard had improved. I am also satisfied from all the evidence I have heard that the stability of their family unit will be maintained.

183. In his report of 4 June 2001, Dr Coventry said that the mother and co-parent suffered "... *huge anxieties*" regarding their perception that the father did not accept the co-parent as a parent of Patrick. That is not the case. The orders to which the father consented on 2 June 2000 (and his letter of 6 December 2000) demonstrate that to be so and as I have said earlier in this judgment, any anxieties by either of the applicants to this end are both unfounded and irrational.

184. Dr Coventry said that continuation of the previous arrangement would result in further distress to Patrick's parents, distress to Patrick, and "... *a failure to build a meaningful relationship*" between Patrick and his father. I do not agree with Dr Coventry nor with his suggestion to place a moratorium on contact arrangements for a period, and suggested by him to be for six months. It was following his report, and notwithstanding, that orders were made by 007-85

Federal Magistrate Phipps for the father's continuing contact with Patrick in the terms of the orders consented to the previous year. 007-86

185. A number of witnesses were called on behalf of the father who observed Patrick and his interaction with the father. In each instance, those witnesses had participated at various contact visits and their evidence was directed to observations made by them of the father's attitude towards Patrick, their interaction and Patrick's response to his father. There was no challenge offered by either counsel for the mother and co-parent of the observations made by them.

186. In her evidence before me, the father's sister described Patrick as an intelligent, increasingly confident and articulate child. She said he was very interested and exploratory of his environment, very respectful and "... *quite a thinker and observer*". I accept her evidence of the father's interaction with Patrick. She is the younger sister of the father with whom she has a close relationship. She described their broad and extended family as being a close one. In his evidence, RF described various interactions between the father and Patrick on eleven occasions of contact between 10 December 2000 (Patrick then being 15 months old) and 16 September 2001. There was no challenge to his observations. He deposed:

> "17. That on each occasion I have accompanied the father to see Patrick, I have seen him behave with the love, care and attention that one would expect from any loving father. He has asked questions, where possible, to find out what new things had been happening, and what changes had occurred since the last visit. the father has been hungry for information about Patrick".

187. There was impressive and unchallenged evidence also given by a friend of the husband's sister who perceptively described Patrick's reaction at a time when a period contact was to end. She said that it was hard to describe in words just how significant all of this interaction around the father's departure seemed to be, but from her observations "... *Patrick was wanting to make sense of and retain something of the short periods of time he spends with his father".* The father also relied upon the affidavits of two other witnesses, neither of whom were required for cross examination. I accept their evidence of the father's interaction with Patrick and I am satisfied that, despite the restricted environment and difficult venue, the father has managed to build a genuine bond with and attachment to Patrick.

007-86

188. I am satisfied from all the evidence that I have heard and seen, whatever

the position as put by both the mother and co-parents, but particularly the mother, that Patrick is developing well and is a contented, happy child. I am satisfied that he enjoys contact periods with the father, that they interact well together and that Patrick derives both warmth and comfort when they are together. I am also satisfied that the father acts appropriately, patiently and affectionately towards Patrick and does not over assert himself to the child or cause discomfort to him.

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4.6 THE VIDEO RECORDING

189. I have referred to the fact that Mr Udorovic tendered a video recording of the interaction between the father and Patrick filmed during a period of contact late in 2001. Having carefully observed the video and when clarification was sought by me, the mother agreed that Patrick was playing well with his father and was interacting with him. She agreed that he appeared interested in their play and that his father appeared to be patient with him. She also agreed that Patrick interacted with the father by talking to him, laughing, seeking his attention and responding appropriately. She further agreed that he appeared relaxed, comfortable and that the father did not over-assert himself upon Patrick, nor did he appear to be 'play acting' for the purpose of the video recording.

190. When Mr Udorovic first announced that he proposed to play the video recording, the mother was most resistant to watching it and requested to leave the court. Following a discussion with the mother, during which I pointed out that it may be necessary for her to provide instructions to her counsel, she remained in the court. I observed the mother during the playing of the video to keenly observe the contents. She displayed no distress or any sign of emotion whatsoever. When asked by Mr Udorovic her impression of the video, she at first replied, in a cold and somewhat casual manner:

> "We watched a video of Patrick's donor, the father and interacting with Patrick at LD's house during contact and we are all sitting in the Family Court."

191. Mr Udorovic, asked whether the father was behaving or acting as a "... *father or a donor*". The mother said he was acting as a donor and added, that she had no objection with what she observed. Later, in the course of cross examination, Mr Udorovic asked the mother whether the father could take Patrick to the park during periods of contact. She agreed, subject however to the condition that firstly, the parents or someone they trusted were present and secondly, that the father did not act in the traditional paternal way, but rather as a donor. He was not to act "*... as a father*". When Mr Udorovic put to her whether he could act as in the video, she again repeated that he was then "...

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acting as a donor" and went on to add that there would be no problem with the father acting "... *with that behaviour at the local park"*. 007-88

192. In her evidence the co-parent too commented that she observed Patrick to be happy. Dr Adler said that he had viewed the video recording and when asked for his professional view at first somewhat bluntly responded by saying that it showed Patrick "... *having contact on a sunny day and he appeared to have a pleasant reaction"*. I would have expected a more professional response, particularly in terms of those aspects evidencing attachment, if any. He was less than helpful in this regard and it was a matter later taken up by Mr Sweeney. Mr Papaleo said that it showed Patrick clearly related to his father and appeared to be a secure child in his presence.

4.7 THE ISSUE OF INAPPROPRIATE CARDS

193. As I have earlier said, there was one aspect of the father's evidence that came under severe challenge, in particular by counsel for the Child Representative. In the course of cross examination by Mr Udorovic, he enquired of the mother that if I took the view it was artificial to restrict the father's contact to two periods each year for three hours, what "... *damage*" could happen to Patrick having greater contact with his father? In a short unhelpful response, the mother said that "... *anything could happen"*. When the matter was pursued, the mother said firstly that he could show materials and behaviour that were inappropriate, secondly, that he would not follow their advice and thirdly that he would lie to them about what occurred during contact periods.

194. Although the first issue was not mentioned in the Order 30 Affidavits of either the mother or co-parent, there was reference to it in the co-parent's affidavit filed 8 May 2001 and that of LD in her Affidavit filed on 20 December 2001. There was also a reference in the medical notes of Dr Stafraci under 5 March 2001 which reads:

> "Little hope he will have capacity to respect (the co-parent) and (the mother's) role as parents. Eg. brings adult cards showing transvestites and half naked men in erotic poses for Patrick to play with".

195. In her affidavit filed on 20 December 2001, LD deposed that during a contact period on 26 August 2001 the father brought some post cards "... *some of which were inappropriate for a young child and one which had a dead man in a public toilet"*. The co-parent in her affidavit filed on 8 May 2001 deposed in relation to a contact period on 4 March 2001 (Patrick then being 18 months old) that (inter alia): 007-88

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> "(xiv) the father brought out approximately 30-40 black and white post cards which he showed to Patrick and left around the lounge room for Patrick to look at. These post cards included a Calvin Klein jeans advertisement showing a bare-chested young man lounging on a chair in a sexually suggestive manner and there were other post cards of mardi-gras, showing pictures of men in drag and such".

196. In an affidavit filed by the father on 17 May 2001, he deposed that the cards referred to by the co-parent were "... *avant cards*" which were free cards on display widely in Melbourne to advertise goods and services. He said they were colourful and some depicted everyday items in an interesting manner. He observed that on one or two occasions Patrick showed a passing interest in them.

197. When examined by Ms Glaister, the co-parent said in relation to the contact period of 4 March 2001 that she saw a post card that concerned her. Accordingly, she went to the library, searched the Internet and found the "... *image"* on the Calvin Klein Internet site which she then down loaded and photocopied. When cross examined about this, the co-parent said that she had never sent any postcards "... *like that"* to the father. She was then shown the postcard (displaying a similar sort of image and referred to in par 132 herein) in the handwriting of the mother, purportedly signed on her behalf and although undated, was received by the father, according to him, shortly after 13 October 1998. She said that she had no recollection of that particular card being sent. She was shown the original Calvin Klein postcard of the photocopy made by her. I do not see anything offensive in relation to these cards.

198. In her evidence before me, LD referred to par 6 and 8 of her affidavit filed on 20 December 2001 and produced photocopies of two postcards, being a Vodafone card and an anti-drug card. She explained, when cross examined by Mr Udorovic that she removed them from "... *a stack of cards"* produced by the father on 26 August 2001 without his knowledge, photocopied them and returned them without comment during the next contact period. LD said that she examined the "... *stack*" of cards "... *as a matter of interest"* and said, "... *if I found one disturbing I would remove them*". It was put to her that in contrast to the Vodafone card, the anti-drug card had never been seen by the father before. The original Vodafone card was tendered by Mr Udorovic. She said, and somewhat curiously in my view, that having discovered those cards she did not discuss them with the father, but chose to quietly remove them and show them to the mother and co-parent who, she said, found them to be offensive. She said that she replaced them back into the stack of cards without comment on

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the next period of contact and that on the contact next following, having discovered them still in the stack of cards, discussed them with the father who, on her evidence, agreed they were inappropriate and removed them. She maintained her position that the anti-drug card was within the stack.

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199. In his evidence in chief, the father maintained that he had not seen the anti-drug card before. He said that LD did approach him on one contact occasion and complained about the Vodafone card and the Calvin Klein card, which he explained had been randomly collected from various cafes.

200. The father was cross examined by Ms Glaister in relation to these cards and made it clear that the Vodafone card was one of his own, but adamantly denied that he had ever seen the anti-drug card before. He said that he did not see a problem with Patrick seeing the Vodafone and Calvin Klein card and that they were "... *age appropriate*". He explained that he had the stack of cards in a toy box on periods of contact and that on two occasions Patrick "... *might have*" had a look through them.

201. Overall, and having regard to the requisite standard of persuasion, I am not satisfied that it has been established that the anti-drug card was in fact within the stack of post cards. Firstly, I am satisfied from all the evidence I have heard and observations made in the witness box that the father is a reliable and truthful witness. I was surprised at the circumstance in which LD, having allegedly seen the offending cards, clandestinely removed them without first having any discussion with the father. That sort of conduct arouses my suspicion. Next, her replacement of them again without discussion is strange conduct indeed. Finally, I was not impressed with the evidence of LD who was clearly in the 'camp' of the mother and the co-parent. Whilst I am surprised that the father considered the Vodafone and Calvin Klein postcards "... *age appropriate*" I do not accept that he would have the same view about the anti-drug card. If that card was in the stack of postcards and known to him, I am satisfied that he would have removed it. As he said when cross examined by Dr Kovacs, Patrick only showed a passing interest in the cards and that it was not "... *a big deal*" for him to have removed them.

5. EXPERT WITNESSES

202. The Child Representative called Dr Robert George Adler and Mr Vincent Papaleo. Although not entirely clear at one stage, and following discussion with Dr Kovacs, she agreed to call Mr Papaleo given it was ordered on 10 February 2000 that the parties attend upon him for the purpose of the preparation of a report to be presented to the Court. On that day an order was also made for the appointment of the Child Representative. Both the expert witnesses provided

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written reports and were cross examined at length in the course of the proceedings. 007-91

5.1 DR ROBERT GEORGE ADLER

203. Dr Adler is a Consultant Child and Adolescent Psychiatrist in private practice. He was engaged by the Child Representative pursuant to an order made by Federal Magistrate Phipps on 11 July 2001 and prepared a report dated 23 October 2001. He also prepared written answers to a number of questions asked of him by the Child Representative. In coming to my determination I have regard to those documents together with his evidence before me.

204. Having set out the sources of information available to him, his various interviews with the parties, a summary of information from various affidavits including some aspects of the first report of Mr Papaleo dated 29 March 2000, Dr Adler then dealt with the interviews he conducted with the parties, including their personal history and his observations of Patrick with each of them. I do not propose to set those aspects out in this judgment as I shall deal with a number of those matters when considering the evidence given by him. I have earlier referred to his observations of Patrick and the child's interaction with the parties.

205. In his summary and recommendations, Dr Adler said that the father maintained he would never have agreed to participate in the process of artificial insemination if he had realised he was to be a "... *known donor*" with no active involvement in the child's life. He reported that the father clearly wanted to be "... *a real father figure*". On the other hand, he reported that the mother was equally clear that she would not have chosen the father as a donor if she had been aware of his wish to be actively involved in the child's care. It is appropriate for me to emphasise that his position, and for obvious reasons, is quite different from my own having spent nine days hearing the evidence of the parties and their witnesses. I have earlier in this judgment made specific findings in relation to that which took place between the mother and the father, and later between the mother, the co-parent and the father in early 1998 and then following.

206. Dr Adler reported that it was appropriate to acknowledge the responsibility of the mother and the co-parent for determining what was in Patrick's best interests and to protect their ability to discharge that responsibility unless it could be shown that they were not doing so appropriately. He then went on to find that nothing he had read or observed suggested that they were acting other than with the child's best interests in mind. Dr Adler reported upon the 007-91

importance of identifying the child's 'nuclear' family which consisted of his biological mother and the co-parent. He said that direct observation of their interaction and the quality of Patrick's attachment to both of them supported that view. He referred to the concept of protecting the family unit and ensuring that Patrick had truthful information about his origin. He said that implicit in the arrangements was that the psychological bond be given precedence over the biological bond. Having regard to the information before him Dr Adler then made the following recommendations:

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> "1. Patrick reside with the mother and the co-parent who should have joint responsibility for decisions concerning the long term and day to day welfare and development of the child.
>
> 2. The mother and the co-parent be required to keep the father advised of any major health and education issues concerning the child and to provide him with photographs of Patrick at least twice a year.
>
> 3. The father be allowed contact with Patrick at least twice a year for a period of no more that three hours on each occasion, or at a greater frequency and duration if agreed by the mother and the co-parent .
>
> 4. Contact should occur in the presence of a person who is well known to Patrick and is mutually acceptable to all parties.
>
> 5. The father be encouraged to send Patrick gifts and a card for his birthday, Easter and Christmas.
>
> 6. The mother and the co-parent be required to keep Patrick informed about the father and the part he has played in Patrick's life.
>
> 7. As Patrick gets older his wishes regarding contact with the father should be respected and the frequency of contact varied accordingly."

207. In his response to the written questions asked of him by the Child Representative, Dr Adler said that the approach he recommended was based upon Patrick having knowledge of and some familiarity with his biological father, "... *rather than an active relationship with him*". It was his view that it was in the child's best interests to differentiate between the role of a father (in the

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traditional sense) and the role of a 'known donor' for a child who had an int 007-93 nuclear family, thus giving precedence to the role of the second psychological parent, (the co-parent) over that of the biological father/known donor.

208. He made it clear as he did in his evidence, that any stress suffered by the applicants was not the main reason for recommending limited contact with the father, but was "... *a factor"* that he took into consideration. He said that the "... *main reason"* for his recommendations for contact was to support the nuclear family and to give primary responsibility for Patrick's well being to his psychological parents. His recommendation of two contacts per year was intended to allow Patrick to "... *know"* his father (and vice versa) whilst giving to the father a limited role in the child's life. He went on to opine that he had no problem with four to six contacts per year and felt that monthly contact "... *may be confusing"* for the child.

209. Dr Adler was of the view that Patrick was likely to express increasing curiosity about his biological origins from the age of six to eight years. He said it was likely to occur in response to a natural maturation and development, as well as a growing awareness of his different family circumstances from most of his peers when he went to school. It was his view that any pressure upon Patrick to reject his father was likely to reduce his wish for contact, at least during the pre-adolescent stage of development. His recommendation of infrequent contact was intended to ensure that Patrick knew his father, so that when the topic of his biological origin was raised, the father would not be a stranger to him.

210. A number of matters were raised by Mr Sweeney in the course of a penetrating cross examination of Dr Adler that has led me to the view that his recommendations are not reliable. In coming to that conclusion, I also have regard to the whole of the evidence that I have heard over the course of the proceedings, and the findings I have made after a careful consideration of the various factual issues raised for my determination.

211. Early in the course of his evidence, Dr Adler said that there were some special circumstances in the way Patrick was conceived and his development which were specific to the proceedings. He was shown the advertisement placed by the mother for a donor in the gay newspaper and in respect of which Dr Adler was quite unaware. Further, he was not aware that the mother and co-parent were physically living apart when the first attempt at artificial insemination commenced. There were, as it transpires, a number of significant factors quite outside the knowledge of Dr Adler.

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212. In his response to the written questions asked by the Child Representative

when dealing with Mr Papaleo's second report, Dr Adler said that there were 007-94 some "... *fundamental differences"* between himself and Mr Papaleo. This was addressed by Mr Sweeney in the course of cross examination.

213. When dealing with the report of Mr Papaleo in response to those written questions, Dr Adler had this to say:

> "... There are many points of agreement between Mr Papaleo and myself in this matter, as acknowledged by him. There are also some **fundamental differences**. Mr Papaleo appears to accept that the father clearly stated his wish to be actively involved in the child's life before Patrick was conceived whereas I believe that the mother and co-parent would not have gone ahead if he had. ..." (emphasis added)

Mr Sweeney cross examined Dr Adler in relation to that and the following exchange took place:

> "(Mr Sweeney): So what you are saying is you draw a conclusion that, really, you can't accept the mother and co-parent would have done this if the position was as stated by Mr Papaleo, right? ... That is my belief.
>
> You can't accept that the mother and co-parent would have ever contemplated a co-parenting role from my client, for example, right? ... That is my belief.
>
> (Later)
>
> Well, let's just then deal with what might have been agreed. If his Honour accepts that in January 1998, subsequent to this advertisement, although not related to it, there was an agreement where my client be a co-parent. Again it assists Mr Papaleo and not you, doesn't it? ... It supports what Mr Papaleo has said, yes.
>
> Well, fundamentally? ... Yes."

This was later taken up by Dr Kovacs in the following exchange:

> "(Dr Kovacs) Do you recall my question, Dr Adler? It is if his Honour were to find that the agreement in relation to the roles of the three adults involved in this case were as the father represents, would this alter the recommendations that you make in your report? ... Yes, it would.

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> In what respect? ... Well, then clearly they would have entered into this agreement on the basis that the father was to take an active role in parenting right from the outset and while I would still have concerns about the conflict and its impact on the child subsequently, I would feel that the basis for the original agreement would be different than the one that I took to be the case in my report".

214. Dr Adler maintained that the decision concerning what was in the best interests of Patrick should be determined by the mother and the co-parent. Mr Sweeney then referred to the 26 conditions imposed by the mother and the co-parent and set out in par 101 of this judgment. Dr Adler made it clear that, even if objectively unreasonable demands were imposed by the mother and the co-parent, he would none the less give primacy to the co-parents and their decisions about the child. Having perused the relevant paragraph setting out those conditions, Dr Adler said that they placed significant restrictions on the father's freedom to act with Patrick in the way that he may wish. He would not concede that it demonstrated a desire for total control, but conceded "... *very substantial"* control. He acknowledged however that such conditions would seriously restrict contact and that he would have "... *some concerns"* about any sort of relationship being promoted by the mother and the co-parent if they had this level of control. In my view, Dr Adler failed to grasp adequately the significance of the restrictions, both in terms of their effects and the state of mind of those that imposed them.

215. Clarification was sought in relation to these conditions and the following evidence was given:

> "(His Honour) They almost border on the irrational if taken in accumulation. Would you agree with that? ... If taken literally, they are very – they are more strict or more specific requirements that (sic) I have previously encountered ..."

216. On another issue, Dr Adler was referred to his recommendations (and earlier set out) and it was put to him that it would require a degree of co-operation between the parties for them to be successful. I observed Dr Adler to be resistant to that suggestion. Given all that I have heard and if left to their own devices, I have no confidence that the mother and the co-parent, but in particular, the mother, would encourage Patrick's relationship with his father, nor co-operate to effectuate a mutually effective arrangement. However, given this judgment and once the orders are made they may well reconsider their position.

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217. Mr Sweeney referred Dr Adler to his report of 23 October 2001 and comment that: 007-96

> "If one accepts that the mother and the co-parent are Patrick's co-parents then it is appropriate to acknowledge their responsibility for determining what is in Patrick's best interests and to protect their ability to discharge this responsibility unless it can be shown that they are not doing so appropriately. Nothing that I have read or observed suggests that they are acting other than with Patrick's best interests in mind ..."

Dr Adler said that he was in effect asserting an acceptance of the 'nuclear family' which should have all of the rights and responsibilities to determine what is in the child's best interests. Dr Adler was aware that the father had, in effect, relinquished the ability to make decisions in respect of the long term care of Patrick and which he saw as an acknowledgment of the role played by the mother and the co-parent. He said that was a significant factor. I take into account Dr Adler's view of the imperative that should be provided to the nuclear family in these circumstances.

218. Finally, having called for and read the professional working file of Dr Adler, Mr Sweeney criticised him for not having referred in his report or evidence to the fact that he had contact with Dr Coventry and had sought to contact both Dr Stafraci and Dr McCausland. He frankly conceded that he had overlooked mentioning his contact with Dr Coventry and otherwise did not view his leaving messages to contact Dr Stafraci and Dr McCausland as being particularly relevant. He said that he had been specifically requested by the mother and the co-parent to contact those medical practitioners. I do not draw the same level of criticism as levied by Mr Sweeney.

219. There were certain aspects of Dr Adler's evidence that I found unconvincing and suggestive of favour towards the applicants. An example of this arose from his observations of each of the parties with Patrick. Having only spent some 60 minutes in conference with the mother, the co-parent and Patrick, and a substantially lesser period (45 minutes) with the father and Patrick, he formed the opinion that the child had a secure and well formed relationship with his two female co-parents and a "... *very different*" relationship with his biological father. In the course of his evidence, he described his observations as "... *fairly brief*".

220. In support of his conclusion concerning the co-parents and Patrick, he said that Patrick:

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> "... in fact turns to them for comfort when distressed. He looks for them when they aren't in the room and he mentions them in his play by name when they are absent. All of those features in a child of a little over two years of age suggests a strong relationship with those people which is different to his relationship with others".

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221. Dr Adler made the observation that Patrick separated readily from the co-parents. When asked the significance of that, he said it suggested a child who either had a secure attachment or no attachment, and as there was no evidence that he was an unattached child, it therefore suggested he had a strong attachment to his carers.

222. When cross examined by Ms Mendes Da Costa, Dr Adler said that he observed Patrick to leave his father "... *without any sign of distress*". In relation to that, he gave the following evidence:

> "(His Honour): So he separated easily from his father? ... He separated easily from the father, yes.
>
> That suggests a secure attachment, if you put the same rules together, does it not? ... I don't believe one can draw that conclusion, Your Honour. I actually did make the point that it is also indicative of a child who is not attached to somebody.
>
> Are you saying he is not attached? ... I don't believe he has an attachment in a similar way to the father.
>
> Somewhere between the two, secure attachment and non-attached. Is there some magic crystal ball that we can see for that, can we? ... I don't believe there is such a measure, Your Honour. My impression was he does not have a similar attachment to the father.
>
> What does it suggest to you that he was able to separate easily from his father? ...It suggests he is a figure with whom he has some familiarity, but does not have an attachment that leads to any distress on separation.
>
> He is a figure with whom he has some familiarity? ...Correct.
>
> But? ... From whom he is not distressed on parting.

223. I readily accept that the current bond or attachment between Patrick ar his co-parents is stronger than with the father. He is clearly more familiar with

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them, having been raised within their household. However, and given the time frames, separated by several weeks at a time in which Patrick has spent with his father and the circumstances in which that time was shared, it is most significant in my view that Patrick has the relationship as described by Dr Adler, but particularly being able to meet with and separate easily from him. I had the distinct impression that Dr Adler failed to accord appropriate comparative weight to that aspect. I have earlier referred to the fact that Dr Adler had seen the video recording. When cross examined by Mr Sweeney he made the following observations:

- That Patrick and his father appear to have a pleasant interaction.

- That he seemed to be quite happy in a general sense with his interaction with the father.

- That the father acted appropriately with him, and

- There were no signs of distress or uncomfortable manifestations of behaviour.

224. Furthermore, I have had the advantage of hearing from a number of witnesses called on behalf of the husband who have observed of the interaction between Patrick and his father. Having regard to all the evidence I have heard, and given the limited time of the observations made by Dr Adler of the interplay between the father and Patrick at his professional rooms, I am quite satisfied that the relationship is a developing one, affectionate and confident.

225. In the event that Patrick had contact with his father in accordance with his recommendations, Dr Adler said that it was very likely his relationship with his father will be "... *less strong or he will have less of an attachment*". He went on to explain that as follows:

> "... The comparison I would make is to an uncle who visits regularly and is therefore an important person in the child's life and with whom the child can have a relationship, but different to the relationship that a child might have with a father who is regularly present in his life".
>
> [Later]
>
> "... I have no doubt that if he has quite limited contact with his father, then his knowledge of him or his relationship with him when he reaches adolescence will be different. There are many examples, some of which I have had personal experience of, where a child meets a biological parent in adolescence and

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> subsequently forms a strong relationship with them, but I don't think one can make a prediction about that in this setting, apart from what I have said, that it is clearly different if there is limited contact than if there is much more liberal contact".

226. On the other hand, it was the view of Dr Adler that if contact was increased it would in all likelihood increase the stress levels within the nuclear family, and as a consequence, likely to have repercussions for the child as well. His emphasis however was directed towards possible repercussions upon Patrick. Dr Adler emphasised the importance attached to maintaining the primacy of the roles played by the mother and co-parent and to that extent, the biological father's role would be, as he said, a "... *a peripheral one*". It was his view, that to do otherwise would be too confusing for Patrick and went on to say:

> "... It is his role in the child's life that I think is the critical question and, as I said previously, if he plays a more active part by frequent contact, then that will change the nature of his involvement and the view I formed was that that would be to Patrick's detriment in the long run in the circumstances of this particular situation ...
>
> [Later]
>
> ... I think they are likely to contribute to a sense of confusion and could contribute and I emphasis could, because I don't think one can make a stronger prediction than that, to some emotional problems as he develops."

227. In addition to those matters, Dr Adler's view was that if contact increased it would "... *more likely to be a paternal contact, rather than a visitation contact*". His proposal for contact however of up to four to six times a year was, as he conceded, an "... *arbitrary*" number but intended:

> "... to be fairly infrequent contact so there is a familiarity, but not so frequent as to promote a relationship that could contribute to the sorts of difficulty that I was alluding to a moment ago".

228. I was surprised at that evidence, particularly his view that contact between Patrick and his father could in the long term, be to the child's detriment. His use of the noun "detriment" was, in my view, somewhat radical having regard to the whole of the factual matrix revealed to me over the course of this long trial.

229. I was concerned by what appeared to me to be a fanciful line drawn by Dr Adler to define the parameters of the father's contact with his son in circumstances where the father has so much to offer the child. By some rigid and undefined rule, is Patrick to be deprived of the love, affection, wisdom and

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appropriate knowledge of his biological father? I understand the 'theory' behind Dr Adler's proposal, but which appears to ignore the human factor and the intangible qualities of a loving parent/child relationship. In the result it is a balancing exercise on my part when weighing the issue of stress to the applicants and hypothetical 'detriment' against the child's appropriate contact with his father and right to be loved by him. Having regard to all that I have heard I have no hesitation in rejecting the recommendations of Dr Adler.

5.2 MR VINCENT PAPALEO

230. Mr Papaleo is a clinical psychologist who specialises in child and family psychology. He prepared two reports in the proceedings dated 29 March 2000 ("the first report") and 13 December 2001 ("the second report"). In coming to my determination I have regard to both of those reports and his evidence before me.

231. In his first report Mr Papaleo clearly identified the issues recording that the co-parents from the outset had maintained there was "... *never any suggestion"* the father would be a parent and that they did not consider he had any parental rights or responsibilities. They claimed that the interim order for contact was "... *fundamentally intrusive"* to their relationship, attacked the very stability of their union and was "... *completely destructive"* of the planning and commitments they had for Patrick.

232. The position of the father was to the contrary. Mr Papaleo noted that the father maintained there was a very clear contractual arrangement between himself and the co-parents and that it was clearly understood he would have a role in the life of any prospective child. The father made it clear he would never have embarked upon such an arrangement had this not been the clear expectation. So far as he was concerned, the agreement between himself and the co-parents to embark upon this arrangement met all of their needs.

233. Mr Papaleo both accurately and succinctly defined the matter as being of immense complexity in which there was a clash of values, beliefs, societal expectations, let alone a direct challenge to issues relating to parenting, parental responsibility, psychological versus biological parent and the status of the relationship between the mother and co-parent. He summarised in broad form the problems in the proceedings. However, in the final analysis, it is the evidence that defines the answer.

234. Mr Papaleo summarised the way in which each party put their case which was consistent with their evidence before me. The position put on behalf of the mother was palpably clear when Mr Papaleo reported that from her perspective,

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the father had "... *basically dishonoured every agreement made between them and that they had promised him nothing in so far as his relationship with the child would be concerned".* She was adamant in her discussion with Mr Papaleo that they did not discuss anything concerning the father's level of contact. She considered herself as having been used by the father *"... as a surrogate to have a child".* Similarly, the co-parent echoed many of the sentiments of the mother and complained of her anxiety associated with the proceedings which she saw as attacking "... *the core"* of her relationship with the mother and the security of their family unit. She complained that her role as a parent was not recognised because she had no biological connection to Patrick. It is clear that the clash of ideology was painful and distressing to her.

235. In his conclusion, Mr Papaleo expressed his fundamental view that psychological relatedness and not biological relatedness was the primary consideration when determining the welfare of children. It was the issue of bonding and attachment which he considered to be significant in these proceedings. There was no dissent drawn to this proposition by Dr Adler.

236. In relation to the co-parent, Mr Papaleo said that from his point of view she had significantly contributed to the process of bonding and attachment to Patrick. He said that he had no doubt that she was a consistent, stable and predictable figure in his life and that Patrick would develop an extremely close, dependant relationship upon her. He would come to view her as a parent.

237. It was Mr Papaleo's view that the issue confronting the father was more complex, and that for Patrick, a knowledge of the person who fathered him and how he fitted within the matrix of his life would at some stage be important to him. He said that he was "... *unequivocally committed to the belief*", that regardless of the "... *ideological considerations"* for any of the parties involved, it was important for Patrick to know who fathered him. He considered that the psychological relevance to Patrick of his father at some point in the future would be extremely important to him. It is not disputed that the applicants had made clear their wish to ensure that Patrick knew that the father was "... *his donor".* However, the caveat at that stage proffered by Mr Papaleo, and in my view, with considerable insight, was to question whether the depth and importance of that aspect was fully apparent to them. In the result, it was his opinion:

> "... that Patrick needs to know who the father is, and he should have some kind of regular contact with him in his life. Whether this is of such frequency as a parent in another situation would require is a difficult question. Ultimately I would weigh up this consideration on the basis of the potential disruption that it would cause to the stability of Patrick's direct primary care nurturing unit. Patrick must

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know who the father is, must have a relationship with him, and needs to have psychological and physical contact. However, if this conduct is of such interruption to the stability and security of his immediate family unit and the people to whom he will relate as parents, then there should probably be less frequent. ..."

238. It was following his report that consent orders were made on 2 June 2000. It is clear to me that the father had carefully considered what Mr Papaleo had to say, responded accordingly and consented to orders investing the mother and co-parent with both the long term and day to day care and responsibility for the nurture of Patrick.

239. Mr Papaleo's second report addressed itself to the report of Dr Adler dated 23 October 2001. In so doing he reflected upon Dr Adler's analysis of "... *the closest parallels to Patrick's situation*", being examples of a heterosexual couple who had a child by artificial insemination, using a known donor, or an adoptive couple in a so-called "open adoption".

240. He agreed that Dr Adler's recommendations reflected the modern practice of strongly encouraging the psychological parent to be open with their child about his or her biological origins. In those cases, as Mr Papaleo pointed out, there had been some process of "... *relinquishment"* of the parental relationship by one biological parent, or in the case of the forced removal of children, a decision made that the quality of care available to that child was so below an acceptable standard that the child's welfare would be compromised. He agreed that the purpose for such an approach as recommended by Dr Adler was to protect the family unit and to ensure that the child had access to truthful information about his or her origins.

241. However, Mr Papaleo sought to draw a distinction with the present proceedings in which there were, in his view, a number of significant differences, including:

- that the father had wanted to be part of Patrick's life since the time before conception;
- that he made a very significant commitment to the mother and co-parent;
- that he willingly gave his genetic material, which was accepted by them;
- that he actively contributed to the

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conception of Patrick;

- that he persevered with his efforts at contact over a long period of time;
- that he maintained a strong and unrelenting wish to be part of Patrick's life, and
- that there was no stated concern about his ability to foster a positive and loving relationship with the child.

I accept that those matters were a value judgment by Mr Papaleo and which in part constituted the 'fundamental' differences between Dr Adler and himself.

242. Mr Papaleo reported his concern that the applicants intended to diminish the relevance of the father in the life of Patrick by relegating him to the status of "... *known donor*" and to consciously exclude him from the child's life. It was his view that this reflected their perception of the integrity of the family unit as created by them and their responsibility to that relationship. They saw the father's application as a direct attack upon that unit.

243. Mr Papaleo reported that the point of greatest divergence between Dr Adler and himself was his view that there should be more focus on the impact upon Patrick of the absence of the father from his life, and not the impact upon the mother and co-parent. He was concerned that the real issue was that they did not want the father to be involved in their lives without much reflection upon the impact, at least in the future, upon Patrick of such a decision. He said that their proposition that the impact upon Patrick of their distress would be so great that Patrick's welfare would best be advanced if the father was completely excluded focused upon their needs, and not the future potential needs of Patrick.

244. Mr Papaleo reported that he discussed with the father how he should approach his relationship with the mother and co-parent, emphasising the importance of respecting their role as Patrick's primary carers, and a need to respect not only their relationship as a whole, but to respect their role as the child's parents, to recognise their perceived vulnerability and the importance of not conveying any assumption that he had a right to Patrick, but rather to request "... *permission*" from them to be more involved in the child's life. He then went on to conclude as follows:

> "Regrettably, with the passage of time, the situation appears to have worsened rather than improved. The refusal for any greater contact reflects the 'no contact attitude' adopted by Patrick's

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> parents, an attitude which may reflect more about them, than what is really in the best interests of Patrick, and reflects a preparedness to advance their own interests and a sense of proprietorship of Patrick, ahead of Patrick knowing and having an active relationship with his father.
>
> **I think there is virtually no likelihood that without the intervention of the court that Patrick will have a relationship with the father,** and it is my concern that at best, the father will be perceived as an inconvenience, and at worst, an irrelevance." (my emphasis)

245. Mr Papaleo made it quite clear when questioned by Dr Kovacs that he endeavoured to consider this matter through the eyes of Patrick to have "... *his parents"* and "... *this other person who is so difficult to define in his parents eyes*". It seems to me that any resolution to that aspect rests with the mother and the co-parent. In any event, Mr Papaleo stated his position as Patrick having two parents and a father and which was a distinction he maintained throughout his evidence. When it was put to him by Ms Mendes Da Costa that the orders sought by the father would intrude upon the homo-nuclear family "... *because that leads him to having not two parents, but three parents"* Mr Papaleo said:

> "Does it, or does it convey to him that he has two parents and a father who is not a parent because there is a different – they exist in a very different model. They are in a different model anyway and – we are having to make the rules on our feet as we go. There is no reason for me to think that Patrick's development will do anything but progress extremely well in the care of his parents. Professor Adler has described him as a very strongly and securely attached child. My observations of him, in the company of his father on the video tape, suggests that unequivocally. Why is it that we can't incorporate in those rules parents and a father, the father who doesn't have the same sort of involvement, and I think that there are other models of this. ..."

246. He agreed that the father's role could be seen as "... *one down"* from that of the mother and the co-parent. He acknowledged that the father was seeking significantly less contact than a "... *parent"* may seek and significantly, had entrusted important decisions about Patrick's day to day life and existence to the mother and co-parent. Mr Papaleo described him as a father who did not have the same sort of involvement as the mother and the co-parent and went on to explain:

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> "... I think we have to re-invent the fatherly relationship in this situation. It is clearly not the kind of fatherly relationship I have with my child but it is different. It is more than a stranger, less than a parent, it is different to a grandparent, it is more important than a grandparent, it is different to an uncle. It sort of falls somewhere in between. **Hopefully it is a loving, caring, regular, familiar, male adult figure in his life** who also happens to be his biological parent". (my emphasis)

247. Mr Papaleo was concerned to have the father included in Patrick's life. He could see no harm to Patrick having some relationship with his father, whilst at the same time possibly not affording to him the same parental responsibilities that were shared by the mother and the co-parent. He said that Patrick could still have a relationship with his father and allow him an opportunity to have the father involved in his life on "... *an as needs basis during that period of his life when he doesn't actually have a say about whether he has contact with him or not*".

248. Whilst time and frequency of contact is somewhat arbitrary, Mr Papaleo considered that the frequency of contact was somewhere between "... *once every two to four weeks ... be it two hours, four hours, eight hours or a day*". He did not consider that an unreasonable outcome from Patrick's perspective in that it still respected the bulk of his time with the mother and the co-parent. He said that it provided:

> "... him some regular contact that breeds and fosters familiarity, gives him an opportunity to do some kind of interesting and fun things, develop – offers an opportunity for him to have a special relationship with this person who is obviously very connected and related to him and might even look like him and at the same time respect and support the importance of his parents and their care for him."

249. It was put by Ms Glaister in cross examination that it would be wise to move more slowly than more quickly in relation to the sort of changes that should be introduced concerning contact. Mr Papaleo disagreed with that. He explained that when dealing with children of Patrick's age, it was his experience that more frequent contact of lesser duration is far better than less frequent contact of longer duration.

250. It was the view of Mr Papaleo that contact as recommended by Dr Adler would just "... *maintain some thread of connection*" to know who his father was, where he came from and how he changed over time. It was his view that the "... *known donor contact model*" was not about maintaining a relationship at all, but

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rather about Patrick maintaining knowledge and awareness of his father. His proposal was more geared towards establishing a relationship.

251. In relation to the video tape, Mr Papaleo said that what he observed was the benefit of a secure attachment to Patrick as he clearly related to the father:

> "... as a safe adult in his life and in his world and relates – and accepts his affection and accepts his offers of care and assistance. He has come to trust him".

Later in his evidence, he explained that what he saw was a happy little boy playing with an adult who he perceived as being both safe and secure. It was a normal interaction showing a secure child with his father. I accept that evidence.

252. Mr Papaleo said that he did not have the slightest doubt that if given an opportunity to spend time with his father and to interact with him, that Patrick would develop a positive and warm relationship with him. He would be in the care of a "... *loving, supportive, attentive adult*". He said there was no reason to think that the father would do anything but cherish and protect Patrick.

253. Mr Papaleo was referred to the father's evidence of the relationship he had with the mother during the period of conception. In relation to that, he said "... *common sense*" must dictate that at some level, the three parties shared a sense of co-operative optimism, that they were all working towards the same goal and that it was not hard to imagine there must have been a level of co-operation and friendliness between them. He said that the father was very positive about the way in which the mother and co-parent were looking after Patrick, that he spoke with considerable pride about the child's development and spoke very positively about his presentation. He went on to say that the father was obviously frustrated and concerned, but was "... *prepared to go slow*" in order to achieve a greater involvement in Patrick's life. He said that the father was supportive and respectful of them, and not too intrusive. I accept those observations.

254. Mr Papaleo acknowledged, and clearly such is the fact, that it was the mother and the co-parent to whom Patrick primarily looked for nurture and comfort. He had no reason to disagree with the opinion of Dr Adler that Patrick had a secure attachment to them. He agreed it was in those circumstances that Patrick was in a good position to form attachments to other people in his life. It was his view that children in those circumstances were able to "... *re-invest into other relationships and form secure attachments*". He agreed that this would require parents being able to respond sensitively to an infant's changing developmental needs and promoting other significant adults in his life. The

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caveat in relation to this however was proffered by Mr Papaleo when he was asked by Ms Mendes Da Costa:

> "And I suggest even with four to six times a year the child would be able to form an attachment to the father albeit not as intense ...? ... Yes.
>
> ... as the attachment that might come with more regular contact? ... Look, fundamentally I would agree with that. However, Your Honour, if you look into the real world there are many examples – for example, Your Honour, there are grandparents who live half way around the world who see their grand children once a year and they have a very strong emotional attachment to them because of the importance that is placed upon that relationship by the parents of the child. I live next door to someone who I speak to when I am polite and I have lived next door to them for 20 years but I am much closer to people who live half the world away because of the importance of the relationship to me. The complicating issue here is that if Patrick's parents don't value a relationship then they are not likely to communicate it to Patrick, directly or indirectly, that this is an important relationship to value and to respect and I suspect that with less frequent contact the message that Patrick will understand is that this is something he has to do that is not really in accord with his parents wishes."

His fundamental concern, as expressed in his second report, was that without the intervention of the Court the father would be perceived by the mother and the co-parent as an inconvenience or irrelevance. I share that concern.

255. I found the evidence of Mr Papaleo to be most persuasive and insightful. He provided a helpful distillation of this complex problem, which was balanced and fair. I have earlier referred to Dr Adler's report in which he said there were fundamental differences between Mr Papaleo and himself. In the result, I accept the father's version of the various conversations underpinning the role he was to play in the life of the prospective child and accordingly, the foundation for the opinion of Mr Papaleo.

5.3 DR NEIL COVENTRY

256. The mother sought to introduce Dr Coventry as an expert witness, relying upon his commentary dated 24 January 2002 of the reports of both Dr Adler and Mr Papaleo. That appears to me to have been a last minute decision on the part of her solicitor. Be that as it may, the integrity of the commentary suffers the serious impediment that Dr Coventry is, as I have earlier said, the current

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treating psychiatrist for both the mother and the co-parent. So much so was properly acknowledged by Dr Coventry when he pointed out that he has "... *supported and treated"* the applicants. In the result, he opined that the contact proposed by Dr Adler was reasonable.

257. Whilst taking the views of Dr Coventry into account in a general way, I do not in the circumstances regard his opinion in the same light as an expert witness. It is not the view of an objective, independent and impartial witness but is one hampered by partisanship. It is crucial for any expert witness to be independent of a commissioning party in providing an assessment of that party's proposal which, in these proceedings, is an acceptance of the recommendations advanced by Dr Adler. Furthermore, and also of significance is that Dr Coventry had only the views of the mother and the co-parent, his patients, and had not interviewed the father or observed any interaction between him and the child. Dr Coventry properly acknowledged being aware of his own "... *biases and lack of objectivity*" given his involvement with the applicants.

258. In forming his opinion, Dr Adler relied upon and accepted that which he was informed by the mother and co-parent as constituting an agreement between them and the father. Dr Coventry, understandably, has ventured into hypothesising his own view of those discussions suggesting that the parties were naive, that there was no malicious intent or deliberate dishonesty and that each had a different understanding which may have changed over time. He appears further to have accepted that the father "... *is moving beyond their initial contract"* and (later in his commentary) that the applicants never wished for the "... *donor/father"* to have a very major role in Patrick's life. The issue of those discussions and the representations there made carry significance in these proceedings and in respect of which I have made findings in this judgment. That to which Dr Coventry refers as "... *clear points"* and upon which he has acted do not entirely accord my findings and which, in the result, affects my view of what he had to say.

259. There are aspects of his commentary that are not in contest with certain parts of the reports of both Dr Adler and Mr Papaleo. For example, those aspects dealing with the importance of psychological bonds and its relationship (in certain factual scenarios) to that of biological bonds. I also accept Dr Coventry's view that it is crucial to allow Patrick "... *to have an opportunity"* to have contact with his father. What he did not address his attention to was whether the mother and the co-parent (but more particularly, the mother) would foster the father in a positive manner to the child such that the father would not be perceived as an inconvenience or an irrelevance. Furthermore, I do not doubt that the mother and the co-parent suffer stress, but in the result, that is

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one factor, albeit an important one that I take into account as part of the overall considerations of Patrick's best interests. In any event, Dr Coventry said that their distress over contact had improved.

260. In his commentary, Dr Coventry said that, given the current conflict, he was of the view that overnight contact should not "... *even be considered until the end of primary school*". In his evidence, he said that would mean that until then, a total of some six hours per annum contact with the father would be in Patrick's best interests. He went on to explain that because of the conflict, there should be no overnight contact until Patrick was about 12 years of age. Somewhat mercifully in the circumstances, Dr Coventry was of the view that the "... *complete exclusion*" of the father from the child's life was "... *probably not the best direction*" and that some opportunity for contact, albeit brief or infrequent was probably of assistance to Patrick in "... *making sense of his origins*". The overall impression I gained from the evidence of Dr Coventry was that he was an advocate for his patients, and whilst well-meaning, suffered the impediment of pre-conceived views and partiality. I reject his opinion.

6. SECTION 68F(2) FACTORS

261. Section 68F(1) of the Act requires that in determining what is in the best interests of Patrick, I must consider those matters set out in s 68F(2) which contains twelve paragraphs of various matters for my consideration. There is a necessary obligation upon a trial judge to consider those matters that are relevant to the proceedings having regard to the evidence touching upon each of them. See *Smith v Smith* (1994) FLC 92-498, especially at 81,084; also *Taylor v Taylor* (1996) FLC 92-661. I have, in the course of this judgment already made a number of findings on issues relevant to my determination which fall under the umbrella of this statutory provision. I do not see it as a useful exercise, given the construction of this judgment and the manner in which it was argued before me, to repeat them again, for to do so would be neither productive nor helpful. Counsel provided passing reference to this section and, given the manner in which they chose to conduct the proceedings, I propose to discuss only those matters most relevant to my task.

262. I am satisfied that Patrick has a loving relationship with the mother and the co-parent. They are and have at all times been his primary care givers and the objective evidence satisfies me that Patrick is a bright, happy and contented child. In saying that, I do not disregard the evidence of the mother and the co-parent concerning their observations of stress exhibited by Patrick. It is however the objective evidence upon which I attach significant weight, particularly that of Dr Adler who was of the view that Patrick was thriving, was developmentally ahead of his expected milestones and was a "...

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temperamentally easy" child.

263. I am also satisfied that as matters now stand, Patrick is familiar with his father, comfortable in his presence and gains considerable reward and benefit from their mutual interaction. Theirs is a relationship that has developed notwithstanding the mother and the co-parent's negative attitude towards the father and in respect of which I have already made a number of findings. In my view, considerable credit should be accorded to the father for his patience and sensitivity in achieving the current situation. I am confident that he will maintain that sentient approach and his responsiveness to the child's sensibilities.

264. I am also to consider the capacity of each "parent" (the wording of s 68F(2)(e) of the Act) to provide for the needs of Patrick, including his emotional and intellectual needs. I am satisfied, subject to the following, that both the mother and the co-parent can undertake that task. However, a number of aspects of their evidence, but particularly that of the mother and in respect of which I have made a number of findings, is of concern. Notwithstanding, I am hopeful, that following this judgment they will achieve a better understanding of Patrick's best interests, and so act as to actively foster his relationship with the father. My expectation is that they will do nothing at all to disaffect that relationship. In his evidence, Mr Papaleo expressed a hope that "... *closure"* may assist all parties, recognising however that it may involve "... *some grief and despair, or mourning of a lost position"*. It is up to them to seize the moment.

265. I am satisfied that the father has the capacity to provide for Patrick's emotional and intellectual needs. He has sensitively approached the issue of his contact with Patrick, demonstrating both compassion and understanding. It is beyond argument that he has manifested a genuine deference towards the mother and co-parent in circumstances where many would have surrendered to frustration and abandoned their application. His tolerance to various distressing and provocative situations has, in my view, been remarkable. Patrick has much to gain from contact with his father.

266. I am also to consider the attitude to Patrick, and to the responsibilities of parenthood demonstrated by the 'parents' and which will for present purposes, include the father. I have already made a number of findings that are relevant to this consideration and to repeat them would be an unnecessarily tedious task. I accept that the mother and the co-parent hold a mistaken, and in my view irrational attitude towards the father's role in Patrick's life. However, now that the proceedings have been completed and the contested issues determined, I have an expectation that they shall make an appropriate adjustment to this unacceptable position and in so doing direct their energies towards Patrick's best interests.

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267. In my view there is an obligation on 'parents' generally to encourage their children to have contact with the absent 'parent'. A residence parent, in this case the mother and the co-parent, should properly prepare Patrick for contact and reassure him that the father loves him and that he will have an enjoyable time. The Applicants should subjugate their own feelings and accept orders of the Court in the spirit of co-operation if they are to work towards Patrick's best interests. Such propositions are, in my view, endowed with common sense. Each of them should inculcate in Patrick a proper attitude of respect for his father, notwithstanding their beliefs.

268. One can never be confident that any order made, particularly in circumstances such as those before me, will not lead to the institution of further proceedings. Much will, in the special circumstances of this case depend upon the mother and the co-parent, but particularly the mother adopting a more understanding position and an acceptance of the father's role in Patrick's life. That is my expectation as matters presently stand and the consequences of which are obvious and need not be re-stated.

7. CONCLUSION

269. It was the applicants choice through their Form 7 Application for Final Orders filed on 8 May 2001 to bring these proceedings before the Court. It has been necessary for me to make findings in relation to various issues raised for my determination which has involved the conduct, the personality and the temperament of the mother, the co-parent and the father. All the findings that I have made arise from the discrete and unusual facts and circumstances of these proceedings, and do not reflect any general conduct or the attitude of other families involved in a homo-nuclear relationship. It is the mother and the co-parent who chose to institute the proceedings and it is their case and the father's response to which I have specifically directed my findings.

270. I have been careful in considering a number of matters arising from the mother's various affidavits and otherwise her evidence demonstrating her unremittingly anti-pathetic attitude towards the father and which, by any objective measure, is irrational. I am satisfied to the requisite standard of persuasion that the mother and the co-parent have thus far been intent upon striking the father from Patrick's life, save in name alone. They, but in particular the mother, have been obsessed with the fact that he is not to have any role in Patrick's life in a natural, ordinary, parental and fatherly manner. I agree with the view expressed by Mr Papaleo in his second report that there is:

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> "... virtually no likelihood that without the intervention of the court that Patrick will have a relationship with the father, and it is my concern that at best, the father will be perceived as an inconvenience, and at worst, an irrelevance."

271. The mother and the co-parent have essentially demonstrated a 'no contact attitude' which is, on all the evidence plainly contrary to Patrick's best interests. I have no doubt that their central theme, and particularly so on the part of the mother, is that the father is just a 'sperm donor' who enabled the mother to conceive. That is their current reality. They are both, but again, particularly the mother, deeply antagonistic towards the father. They perceive themselves as Patrick's exclusive 'parents' which carries with it all rights, duties and obligations arising from their parenting of the child. They have presented themselves as having absolute and unfettered control with no room for the father in Patrick's life, save for a public record acknowledgment of him as the 'sperm donor'. That too has limited application in their eyes for they have chosen that course, as it appears to me, for therapeutic reasons in order that at some time in the future Patrick may identify his father and should he so choose to do so, have contact with him.

272. The terms of the proposed agreement prepared by the mother and the co-parent in April 1998 were generally unfair, unrealistic and contrary to the welfare of a child born of a process of artificial insemination by a known donor who was anxious, willing and able to play a fatherly role in the traditional sense. It was a highly unsatisfactory document and one that readily unveiled the attitude and personality of both the mother and the co-parent. It provided to them total authority over and control of Patrick to the exclusion of the father. Curiously however, it did provide for a contact regime being one that is now utterly contrary to their current application.

273. I have no doubt, that as the matter presently stands, there is little, if anything that the father could do or say, despite the consent orders of 2 June 2000, that could satisfy the mother that he accepted her relationship with the co-parent and that they were Patrick's primary care takers. In my view, that is a misconceived and grossly negative attitude for both the mother and co-parent to take given all those matters to which I have referred.

274. On the face of its plain wording, s 60H(3) of the Act, as it presently stands, provides that the father is not a 'parent' of Patrick, despite the fact that the child bears his genetic blue print. That may be understandable on the basis of the specific role undertaken by a "donor" in the historic sense of artificial insemination. It is readily understood that to encumber a donor, for exam with financial responsibility for child support pursuant to the provisions of the

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Child Support (Assessment) Act 1989 ("the Assessment Act") would be fundamentally wrong and it was to that comprehensible end in the specific circumstances before him that Fogarty J in *B v J* (1996) FLC 92-716 directed his clear analysis of the law.

275. But what of the father's position in the circumstances as I have found them to be in the proceedings before me? He was the donor of his genetic material upon an understanding (as I have found) that he was to have a role in the life of any prospective child. He has at all times following Patrick's birth intelligently demonstrated by both sacrifice and concession a sensitive tolerance of a secondary role to that of the mother and co-parent. I am quite satisfied that he has never relinquished nor wavered in his desire to be part of Patrick's life. He has actively, solicitously and patiently contributed to his conception. He has persevered, despite the imposition of the many unreasonable conditions to which I have earlier referred, in his contact with Patrick and collaterally maintained "... *a strong and unrelenting wish"* to be part of his life. He has demonstrated an ability to foster a positive and loving relationship with Patrick.

276. The position of the co-parent too has not been without difficulty. She has perceived her role as marginalised by the Court and has struggled with the concern that she was not recognised as a 'parent' because she had no biological connection to Patrick. I accept that she has invested considerable energy, love and commitment into her relationship with the mother and all aspects associated with the planning, the gestation period and the birth of Patrick. I accept the evidence of Mr Papaleo that she is "... *a consistent, stable and predictable"* figure in Patrick's life and that, as matters presently stand, her status as a 'parent' in "... *his eyes at least"* will never be challenged.

277. I have given my most earnest consideration to the form of orders I should make which, in the unusual circumstances of these proceedings would promote the best interests of Patrick. For the reasons that I have already advanced, I do not propose to accede to the proposed orders put forward by counsel for the mother and for the co-parent. Their proposal arose from the opinion of Dr Adler, which has found no favour with me. Their original application was that there be no contact between the father and Patrick.

278. The orders sought by the father are those set out in his Case Outline Document and which appear to me to have been a carefully considered proposal with a graduated increase in his contact with Patrick. Even at that stage, and without the benefit of having the views expressed by Mr Papaleo in his evidence, the proposals put forward underpin a responsible awareness to the current situation and promotion of Patrick's best interests.

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279. In his evidence, Mr Papaleo was concerned to try to maintain a distinction between the "... *parents*" (the mother and the co-parent) and "... *the father*", and endeavoured to look at the issue through the eyes of what it might be like for Patrick to have his parents and "... *this other person who was so difficult to define in his parents' eyes*". Mr Papaleo maintained the relevance and importance to Patrick of his father and that it was better for him to have "... *three loving parents*" in his life than just two, and also to have the father's family at least connected to him in some way. I agree with that evidence.

280. Mr Papaleo did not criticise the orders sought by the father and which, he observed, were geared towards the establishment of a relationship between the father and Patrick. He said that the frequency of contact should be such that it allowed Patrick a relationship with his father and "... *at the same time was not being so intrusive to his parents that it was workable*". In my view, the orders sought by the father are consistent with that evidence. Mr Papaleo's overall position should properly be viewed in the context of Patrick being only two years of age and currently having contact with his father for two hours each three weeks. That is, his opinion is caught in time, and I am confident that with the effluxion of time matters will materially change. Patrick will mature and become more aware of his position. I do not consider that Patrick should by court order be compelled to call the father "... *dad*" or by his Christian name. He should be left, without influence being exercised upon him, to address his father in a manner with which he feels comfortable. Consequently, I do not consider that there should be a specific issues order as proposed by the Child Representative that the applicants encourage Patrick to call his father by his Christian name.

281. I agree with Mr Papaleo when he said that it was fair to argue that what the father was seeking in terms of contact with Patrick was significantly less than a parent in a normal heterosexual situation might seek. It is for that reason I see that the father's proposals sit well with Mr Papaleo's view of the dynamics of the current situation and its growth towards more 'usual' contact, which is not achieved until 2004. The father's proposed orders over the next 18 months sit seamlessly with Mr Papaleo's evidence of Patrick having "... *two parents and a father*", whilst according to the mother and the co-parent the principal home base for Patrick's general care and nurture. That proposal could not by any measure be seen as a "... *three parent model*".

282. The father's proposal also sits well with the evidence of Mr Papaleo in terms of frequency and duration. In the course of cross examination by Ms Mendes Da Costa, and in relation to that aspect, he had this to say:

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> "... I don't want to apply any of my old models to it but I would have thought some contact every two or three or four weeks for somewhere between four and six or seven hours would seem like not an unreasonable outcome from Patrick's perspective in that it still respects his, the very bulk of his time with his mothers. It gives him some regular contact that breeds and fosters familiarity, gives him an opportunity to do some kind of interesting and fun things, develop – offers an opportunity for him to develop a special relationship with this person who is obviously very connected and related to him and might even look like him and at the same time respect and support the importance of his parents and their care for him."

283. Mr Papaleo explained that, in his experience, more frequent contact of lesser duration was far better than less frequent contact of longer duration. He also made it clear that it was "... *hard to understand"* why there should be any supervision as such. In relation to that, he said:

> "... There might obviously – there might be some benefit to, you know, the father continuing to see Patrick with someone who was familiar but the idea is that he becomes more familiar so that Patrick transfers the sense of trust to him and invests in him as a safe person. So probably not; I probably wouldn't agree with that to be honest".

284. Having given this considerable thought, the only matter advanced by the father with which I disagree is his proposal that in each alternate week to the proposed alternate weekend contact, he have overnight contact from the conclusion of school/creche on Thursday to the commencement of school/creche on Friday. Given the circumstances of this case, and doing the best I can even forward looking to September 2004, such an order has the potential to be disruptive of the child's alternate week residence with the parents.

8. IS THE FATHER A 'PARENT' UNDER THE ACT?

285. An important matter raised by the parties and referred to in the agreed Facts in Issue, was whether or not the father in these proceedings was 'a parent' pursuant to the relevant provisions of the Act. I was not referred to any decision in Australia that specifically addresses the issue of whether a sperm donor, whether anonymous or known, is a 'parent' within the meaning of the Act. There is no general definition of 'parent' for the purposes of Part VII of the Act. However, there has been one decision on the issue of whether a sperm donor is a 'parent' for the purposes of the Assessment Act and this case forms

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a background to the proceedings before me.

8.1 Who is a 'parent' under the *Child Support (Assessment) Act* 1989?

286. In *B v J* (supra), Fogarty J held that B, a known sperm donor for a lesbian couple, was not a 'parent' for the purposes of the Assessment Act. The facts in that case were that B and J, who were friends, entered into an arrangement that B provide sperm for the insemination of J by her lesbian partner, R. All three parties were in agreement that B would have no financial or parenting obligations in respect of any child conceived by that procedure. Two separate incidences of insemination resulted in two children. By consent, B was registered as the father on the birth certificates of both children. In accordance with the agreement between the parties, B took no active role in the children's lives, provided no financial support, and had very little contact with them.

287. Due to pressure from the Department of Social Security which threatened to cut off J's pension if she did not seek child support from B, J and the Child Support Agency brought an action against B. The issue before the court was whether B was a 'parent' within the meaning of the Assessment Act and therefore liable to pay child support. It was concluded that he was not. In reaching this conclusion, Fogarty J found that by virtue of s 26 of the Assessment Act, the only person liable to pay an assessment from the Child Support Agency was a 'parent' as defined by that Act. Ordinarily, the biological parents of a child are treated in law as the parents of the child. However, s 5 of the Assessment Act altered that position for children who had been adopted or born as the result of the carrying out of an 'artificial conception procedure'. Section 5 provides:

> " 'parent' means:
>
> > (a) when used in relation to a child who has been adopted – an adoptive parent of the child; and
> >
> > (b) when used in relation to a child born because of the carrying out of an artificial conception procedure – a person who is a parent of the child under section 60H of the Family Law Act 1975;"

288. Accordingly, where the term 'parent' appears in the Assessment Act in relation to a child born as a result of artificial insemination it refers to a person who is a 'parent' as defined under s 60H of the Act. If the biological parent did not fall within that definition, then he or she was not a parent for the purposes of the Assessment Act.

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289. In the course of his judgment, Fogarty J held, citing Hodgson J in the NSW decision of *W v G* (1996) 20 Fam LR 49 at 64, that the definition of 'parent' in s 5 of the Assessment Act was an exhaustive one because of the use of the word 'means', rather than 'includes' in the definition:

> "[U]sing the word 'means' rather than 'includes' makes it clear that, in relation to a child born in the carrying out of an artificial conception procedure, the *only* person or persons who satisfy the definition of 'parent' in the Child Support (Assessment) Act will ... be persons who come within s 60B(1) [now replaced by s 60H]. A biological parent, who donated sperm, will not be a parent, unless caught by s 60B(1)." (*B v J* at 83,618)

290. Section 60H of the Act deals with children born as a result of 'artificial conception procedures', which are defined in s 60D of the Act to include artificial insemination. The relevant provision in this case is s 60H(3) of the Act, which deals with a man who donates his semen which is used by a woman who is not married or in a (subsection (4)) de facto relationship, or where there is no consent to the insemination on the part of the woman's husband or partner. It provides:

> "(3) If:

(a) a child is born to a woman as a result of the carrying out of an artificial conception procedure; and

(b) under a prescribed law of the Commonwealth or of a State or Territory, the child is a child of a man;

> then, whether or not the child is biologically a child of the man, the child is his child for the purposes of this Act."

291. The effect of s 60H(3) of the Act is that where under a prescribed law of a State or Territory the child is a child of a man, the child is also to be regarded as his child under the *Family Law Act*. Thus a child is to be regarded as the child of the biological father and the biological father a 'parent' *only* if there is a specific State or Territory law which expressly confers that status on a semen donor for the purposes of the *Family Law Act*. However, there are no prescribed laws in any State or Territory to that effect. See Schedule 6 and Schedule 7 of the *Family Law Regulations*. Since no prescribed laws exist under s 60H(3) of the Act, Fogarty J held that B was not a 'parent' of the children for the purposes of the Assessment Act.

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292. As Dr Kovacs argued, (Dorothy Kovacs, '*The AID Child and the Alternative*

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Family: Who Pays? (or *Mater semper cetra est – That's easy for you to say*!) (1997) 11 *Australian Journal of Family Law* 141, 149) the fact that there are no prescribed laws under s 60H of the Act is not surprising when one examines the laws of the States and Territories with respect to the position of donors of semen for artificial insemination procedures, and the history of such legislation. For example, the relevant Victorian provision, s 10F of the *Status of Children Act* 1974, provides:

> "(1) Where semen is used in a procedure of artificial insemination of a woman who is not a married woman or of a married woman otherwise than in accordance with the consent of her husband, the man who produced the semen has no rights and incurs no liabilities in respect of a child born as a result of a pregnancy occurring by reason of the use of that semen unless, at any time, he becomes the husband of the mother of the child.
>
> (2) For the purposes of sub-section (1), the rights and liabilities of a man who becomes the husband of the mother of a child so born are the rights and liabilities of a father of a child but, in the absence of agreement to the contrary, do not include liabilities incurred before the man becomes the husband of the mother."

293. The effect of these provisions is to positively provide that the donor of semen does not incur any liability or retain any rights in relation to children born as a result of artificial insemination. The position is the same in all States and Territories of the Commonwealth of Australia. This situation stems from the decision of the Standing Committee of Commonwealth and State Attorneys-General in July 1980 (and reaffirmed in 1981, 1982 and 1983) that uniform legislation on the status of children born as a result of artificial insemination by donor should be enacted in all Australian jurisdictions, and contain the following provisions:

> "a husband who consents to his wife being artificially inseminated with donor sperm shall be deemed to be the father of any child born as a result of the insemination;
>
> the sperm donor shall have no rights or liabilities in respect of the use of the semen; and
>
> any child born as a result of AID (artificial insemination by donor) shall have no rights of liabilities in respect of the sperm donor."

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294. As a result of this direction each State and Territory enacted identical (for relevant purposes) legislation designed to provide that a semen donor would not incur liability nor attain any rights in respect of a child born as a result of an artificial insemination procedure.

8.2 Who is a 'parent' under the *Family Law Act* 1975?

295. Though the issue was not argued in *B v J* (supra), it was the view of Fogarty J, as outlined in dicta, that it did not necessarily follow that because B was not a parent under the Assessment Act he was also not a parent under the *Family Law Act*. Fogarty J noted that the word 'means' preceding the definition of 'parent' in the Assessment Act did not appear in the Family Law Act, so that:

> "There is no corresponding provision in the Family Law Act which would exclude a biological parent from otherwise being regarded as a parent. That is to say that it is not clear that the provisions of s 60H do not enlarge, rather than restrict, the categories of persons who are regarded as a child's parents. In the case of the Assessment Act, it is the word 'means' which makes it clear that the provision is exhaustive. Prima facie, s 60H is not exclusive, and so there would need to be a specific provision to exclude people who would otherwise be parents. Relevantly here, that means the donor of genetic material. (at 83,620)"

296. Thus, according to Fogarty J, a sperm donor who was not liable under the Assessment Act may still be a 'parent' under the *Family Law Act* because s 60H of that Act is not an exhaustive definition.

297. In contradiction to that argument, s 7 of the Assessment Act provides that *'unless the contrary intention appears expressions used in this Act and in Part VII of the Family Law Act 1975 are to have the same respective meaning as in that Part'*, and a reading of the legislation fails to reveal any contrary intention.

298. As Sandor argued, (Danny Sandor, '*Children Born from Sperm Donation: Financial Support and Other Responsibilities in the Context of Discrimination'* [1997] AUJIHRights 23; (1997) 4(1) *Australian Journal of Human Rights* 175) Fogarty J's conclusion:

> "... appears a curious result given that all states and territories have laws which presume that a sperm donor is not a parent unless he is the legal or de facto husband of the recipient.' (at 178)

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It would seem that in raising the possibility of a divergence between the state and federal law, Fogarty J was pointing to the absence of equivalent provisions

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in the *Family Law Act* or other federal law and was suggesting, without deciding the issue, that state or territory presumptions would not apply to matters conducted under that Act. (Dr Adler helpfully referred to this article in the course of his report.)

299. In my view, such a conclusion could have serious and unintended implications for sperm donors. If the state and territory presumptions had no effect and a known sperm donor was a parent under the Act, it is difficult to see why that would not be the case for unknown donors in similar circumstances. Contrary to agreement and intention, both known and unknown donors may find themselves with significant responsibilities as well as rights. Fogarty J acknowledged this in *B v J* (supra) when he had this to say:

> "[I]f a semen donor could be the subject of a Stage 1 [child support] application [under the Family Law Act] (because not excluded by the legislation from being a parent), he would, presumably, be a 'parent' for all other provisions of Pt VII of the Family Law Act. This would encompass the statement of the objects and principles of Part VII in s 60B including 'to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children'; and that except where contrary to the child's best interests, a child has the right to know and be cared for by both parents, a right to contact on a regular basis with both parents, that parents share duties and responsibilities concerning the care, welfare and development of their children, and that parents should agree about the future parenting of their children.
>
> Further, and more specifically, parental responsibilities which s 61C ascribed to a child's parents in the absence of a court order to the contrary would reside with the donor (and the other party), until a court ordered otherwise. And, in determining the child's best interests, the donor's relationship with the child would need to be considered (s 68F(2)(b)). I need not here refer to each of the sections in which the term 'parent' is used, but these examples demonstrate the difficulty to which the legislation may lead." (at 83,620)

300. This conclusion would be an alarming one for most participants in donor insemination arrangements. It also highlights the substantial difficulties of attempting to incorporate same-sex families into global definitions of parenthood premised on a heterosexual model.

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301. Contrary to Fogarty J's arguments, Sandor argues, with which I agree, that in the absence of express provisions in federal law, the *Family Law Act* can and

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should be read in light of such state and territory presumptions, thereby leaving the sperm donor, known or unknown, outside the meaning of 'parent'. Where this leaves individuals such as the father is a matter for the legislature. Given the father's active involvement in Patrick's conception and his ongoing efforts to build a relationship with his son, it is a strange result that he is not Patrick's 'parent'. Equally strange, however, would be the case of an unknown donor who deposits his semen at a sperm bank only to find that he has parental responsibilities under the *Family Law Act* for any child conceived of his genetic material.

302. The decision of Fogarty, J in *B v J* (supra) has been referred to on two occasions in the context of decisions relating to s 60H of the Act. However, as neither case deals specifically with the position of a sperm donor, they provide little by way of direct guidance.

303. In *P v P* (1997) FLC 92-970 Mullane J considered the position of a husband who initially consented to his wife undergoing artificial insemination but withdrew his consent prior to conception of the child. Thus the question in *P v P* was not whether the sperm donor was the child's parent, but whether the husband was regarded as a parent under the Act. The Court found that the wife was inseminated against the husband's wishes and without his knowledge so that s 60H(1) of the Act did not confer on the husband the status of parent. Interestingly, Mullane J seems to have assumed that the donor was also not a parent as he held that the child had "... *'only one parent, her mother'*" (at 84,741).

304. The judgment of Fogarty, J in *B v J* (supra) was also referred to by the Full Court of the Family Court in *Tobin v Tobin* [1999] FamCA 446; (1999) FLC 92-848. In that case a guardianship order was made in favour of a husband and wife by the Supreme Court of Queensland in respect of a child who was previously in their foster care. The question for the Full Court was whether the guardianship order and parenting orders made subsequently by the Family Court which amended the guardianship responsibilities, conferred on the husband the status of a parent under the Act. The Full Court held that the word 'parent' in the Act should be given its natural meaning in accordance with the Oxford and Macquarie Dictionaries as "... *'A person who has begotten or borne a child'*". Thus a parent with a State guardianship order or a person *in loco parentis* was not a parent for the purpose of Part VII of the Act. This reasoning would suggest that the father in this case, as the biological parent of Patrick, is a parent for the purposes of the Act. However, the unique position of a sperm donor was not before the Court and for this reason it is of limited application.

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305. Several decisions of State Supreme Courts have, since *B v J* (supra),

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applied the equivalent provision to s 10F of the Victorian *Status of Children Act* to sever the legal relationship between a donor and child. In the Supreme Court of the ACT *In the Matter of an Application Pursuant to the Births, Deaths and Marriages Registrations Act*, 5th May 2000 (unreported), Crispin J held that he could not make a declaration that the donors in that case were the parents of the child despite that conclusion being in the interests of all parties, and although it would promote the welfare of the child. The facts in that case were that the fertilised egg of H1 and W1 (the donors) was carried pursuant to a surrogacy arrangement by W2 with the consent of H2. As previously agreed, upon birth, the child was returned to H1 and W1. However, Crispin J held that H1 and W1, in accordance with ACT law, were not the parents of the child, although biologically they were his mother and father. A similar decision in comparative circumstances was made by Windeyer J in the Supreme Court of New South Wales in *PJ v DOCS* [1990] NSW SC 340.

306. I have earlier found that the father holds a genuine and profound paternal love for Patrick and has, notwithstanding the negative definitions sought to be ascribed by the mother and the co-parent, much to offer the child in achieving the milestones of his development over the forthcoming years. It is in these particular circumstances difficult to understand that he is excluded, for the purposes of the Act, from being properly known as a 'parent' of Patrick, but merely to have jurisdictional status in the Family Court as "... *any other person concerned*" with Patrick's welfare (s 65C(c) of the Act), or as was submitted on the part of the applicants, to have an avuncular role in the child's life.

307. To be Patrick's biological father in the circumstances as found by me and yet denied by bare statutory definition appropriate nomenclature as one of his 'parents' in my view sits awkwardly with the provisions of an Act which regulates family law in this country. It falls seamlessly from the expert evidence of both Dr Adler and Mr Papaleo that the mother and her committed lesbian partner in their homo-nuclear relationship are the child's 'parents', but that a similar and appropriate recognition is not accorded to the biological father.

308. As matters presently stand, the father's position is this. Patrick has the right of contact "... *with other people significant to* (his) *care, welfare and development*". See s 60B(2)(b) of the Act. As a person who is "... *concerned with the care, welfare and development of the child*", the father may apply for a parenting order pursuant to the provisions of s 65C of the Act. In that event, the child's best interests are of paramount consideration (s 65E of the Act) and the considerations pursuant to s 68F(2) apply. On that basis the father, whilst not a 'parent' can have certain parental responsibilities conferred upon him within s 61D(1) of the Act.

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9. POSSIBLE RECOMMENDATIONS

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309. As far back as 1996, Fogarty J commented in *B v J* (supra) that:

> "It is a reality of life children are born as a result of a variety of artificial conception procedures, out of non-traditional circumstances, and into non-traditional families. Legislation which deals with the personal and financial responsibility for such children should be clear and exhaustive and should recognise the reality of these situations". (at 83,621)

310. Over five years have passed since his Honour expressed his view and, as these proceedings so starkly highlight, there has been no appreciable progress in this area. During the course of the proceedings the issue of how to best address the various identified problems was discussed by counsel from time to time at my invitation by reason of my growing concerns. Whilst one could envisage labyrinthine drafting problems alone, none the less, in my view legislation should be considered to recognise the reality in our community of the non-traditional circumstances evidenced in these proceedings and long ago identified by Fogarty, J. I have given this matter consideration and in so doing I have drawn heavily on the scholarly and helpful submissions by Dr Kovacs, in her role as counsel for the child representative.

9.1 FEDERAL LEGISLATION

311. The definition of 'parent' in s 60H of the Act requires clarification. The current provision was designed to maintain consistency between the Federal law and the status of children legislation of the States within the Commonwealth. It was also designed to ensure that the opposite-sex partner of a woman undergoing artificial insemination treatment is considered a parent of any child conceived through such a procedure, and to protect donors from parenting responsibilities and financial burdens they did not agree to when making available their genetic material.

312. However, as these proceedings illustrate, not all families using artificial insemination procedures fall into the traditional heterosexual model that the legislation intended to protect. Accordingly, consideration should be given to review the definition of 'parent' in s 60H of the Act to take into account that there are varying arrangements between donors and prospective mothers, and that donors such as the father in these proceedings may not only consider themselves a 'parent', but may also be considered by the recipient of the genetic material to be a parent.

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313. The prescribed legislation for the purpose of each of the sub-provisions of

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s 60H of the Act should also be reviewed by each State and should set out, for the purposes of State law, who is intended to be a 'parent'. The States need to decide whether they intend to include individuals such as the father within the definition of 'parent'. Whatever State legislation is undertaken and prescribed in the future, it is important that issues concerning status of children be uniform throughout Australia such that if the States will not or cannot ultimately concur on these matters, it may become appropriate to ensure that the Commonwealth is armed with adequate powers to enact such laws.

314. Parties to artificial insemination should be able to plan parenting arrangements prior to conception in an endeavour to avoid, or at least minimise future, conflicts in the interests of the prospective child. It is currently open to a lesbian co-parent to obtain a parenting order as a "... *person concerned with the care, welfare or development of the child*" (s 65C(c) of the Act) as occurred in these proceedings, and this will remain the principal means of legalising the co-partner's future relationship with the child. However, incorporating the donor in pre-planning poses problems under the current legislative regime.

315. It is possible that parenting contracts might avoid the associated stress of days of evidence as to the parties' intentions, but as I have earlier said, they are unlikely to dictate the final outcome of a case. As Fogarty J stated in *B v J*, (supra) (at p. 83,618) "... *It is well established that statutory rights granted to individuals which rest upon wider principles of public policy may not be waived*", and for which there is clear authority. An agreement absolving a father from the obligation to pay maintenance for a child would not be enforceable either directly or by way of estoppel. Nor would an agreement absolving the father from any other aspect of parental responsibility. Equally, a written agreement which provided for a donor to have frequent contact with a child could not prevail over a finding by the Court, in a given case, that contact was not in the best interests of the particular child. Whilst agreements may be valuable in avoiding, pre-empting or resolving inter-personal disputes between the individuals in donor insemination arrangements, it is the considerations in s 65E and s 68F(2) of the Act rather than the terms of any agreement which will dictate the outcome for the child.

316. Given the inherent problems of parenting contracts, the use of registered Parenting Plans pursuant to Division 4 of Part VII of the Act may assist parties in proceedings such as those before me. However, that Division is not in fact apposite to the current situation. Section 63C(1) of the Act refers to an agreement (that is, a parenting plan) between 'parents' which is not the position of either the co-parent or the father as donor. Accordingly, consideration should be given to Division 4 of the Act, so far as the *Commonwealth Powers (Family Law – Children) Acts* of the States allow, being extended to include such parties

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so as to permit a three way agreement.

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317. It was the submission of Dr Kovacs, and with which I agree that the onerous obligations associated with registration of a parenting plan which attach to legal practitioners and counsellors under the provisions of s 63DA(1) of the Act would have enabled the parties in these proceedings to undertake counselling and to receive advice which might have exposed, at an early stage, some of the problems they later experienced. Section 63DA(1) of the Act contemplates that supportive programs would be available. Further safeguards are enacted in s 63E(2) and (4) of the Act as conditions of registration of a parenting plan. The plan could be executed before the conception took place and certainly before the birth, although it could not be registered until after the child was born.

318. Dr Kovacs observed that once registered, the child welfare provisions of a parenting plan would be given presumptive effect as an order of the Court under s 63F(3) of the Act, but which could not be the case as presently drafted if the child was to live with someone who is 'not a parent', that is, a person in the position of the father as the donor, or the co-parent in the proceedings before me. Further amendment of the parenting plan provisions of the Act would accordingly be required to provide for the child to live with those persons. The child maintenance provisions of a parenting plan would also not be effective as currently drafted because the child must be "... *of the relevant marriage*" pursuant to s 63G(1)(b) of the Act and they are not applicable where a child support assessment is available in relation to a child.

319. Whilst the *Family Law Reform Act* 1995 enacted notions of parental responsibility which, in certain areas reflected the then "*state of the art*", they failed in significant respects to move beyond the general situation of a child being born into and/or living in a heterosexual household. For the most part, references in Part VII of the *Family Law Act* to both parents (eg s 60B(2) of the Act) or to either or both parents (eg s 61C(2) of the Act) highlight that Part VII proceeds from assumptions about the child's family which have no application in the present circumstances. A review of the federal law in this area should be considered so that families such as are involved in the present proceedings are not precluded from the substantial protections of the Act.

9.2 STATE LEGISLATION

320. Despite recently enacted legislation recognising same-sex relationships in several States (eg: *Statute Law Amendment (Relationships) Act* 2001 (Vic), and *Property (Relationships) Act* 1984 (NSW)), there are many areas of State law which continue to discriminate against gay and lesbian Australians. In

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particular, most states discriminate against lesbian and single women in relation to access to infertility treatment procedures. Artificial insemination procedures are regulated in Victoria by the *Infertility Treatment Act* 1995 (Vic) and are only available to women who are married or in a heterosexual de facto relationship. The Federal Court of Australia in *McBain v State of Victoria* [2000] FCA 1009 (28 July 2000 – Sundberg J) held that this provision was invalid due to inconsistency with s 22 of the *Sex Discrimination Act* (Cth) 1984. This decision is currently on appeal to the High Court of Australia. Furthermore, services are also only available to women who are infertile or where the embryo is at risk of genetic abnormality or disease. Accordingly, unless the legislation is amended, lesbian women such as the mother and co-parent in these proceedings are prohibited from accessing assisted reproductive services. The unsatisfactory nature of the position amongst the states is discussed by Millbank, *If Australian Law Opened its Eyes to Lesbian and Gay Families, What would it see?* Vol 12 1998 Australian Journal of Family Law, at p 99. There is much substance to many of her criticisms.

321. In her submissions Dr Kovacs pointed out that the regulatory regime created by the State laws is buttressed by the imposition of onerous penalties (see for example, ss 6 and 7 of the *Infertility Treatment Act* 1995 Vic). However, it is arguable that these provisions target unlicensed or non-complying medical operators rather than the common and informal arrangement which presents in these proceedings and which took place between these parties. In my view, consideration should be given to clarifying the penalty provisions, so that what appears to be the simple and common process of donor insemination is clearly removed from their scope. That too might facilitate the establishment of counselling and advice facilities for participating parties such as those in the proceedings before me.

322. It is time for State laws to be enacted to make available to lesbian women and their known donors a well regulated scheme with all of the safeguards, medical and otherwise available to heterosexual couples. There is no doubt that the parties in this case would have benefited from such services and may not be in the position they are today had they been able to access counselling currently available to heterosexual couples.

10. OTHER MATTERS

323. In my view, Patrick's 'family' is comprised of the mother and the co-parent. It is a homo-nuclear family. They are his parents. That which constitutes a 'family' has been the subject of substantial debate particularly relevant to the gay and lesbian community. It has been argued that there has been –

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> "... a shift away from the indicia of biology and marriage relationships ... towards a more flexible or purposive definition of family".

(See: Australian Institute of Family Studies – *Family Matters No. 55, Autumn 2000; Jenni Millbank*). It appears to me that a "... *family*" being limited to the traditional hetero-nuclear family does not now reflect the reality of the various family forms within modern society. I see no reason why "... *family*" should not also include a homo-nuclear family as part of the diverse configuration of families reflected in our community.

324. In my view, both the mother and the co-parent have demonstrated a history of "... *mutual interdependence, of the sharing of lives, of caring and love, of commitment and support*" (per Lord Slynn *Fitzpatrick v Sterling Housing Association Ltd* (2001) 1 AC 27 at 38. They, together with Patrick, are a 'family'. It is also appropriate to recall what Nicholson CJ had to say when dealing with the changing concept of family, namely:

> "One of the fundamental misconceptions which plagues me is the failure to understand that heterosexual family life in no way gains stature, security and respect by the denigration or refusal to acknowledge same-sex families. The sum social good is in fact reduced, because when a community refuses to recognise and protect the genuine commitment made by its members, the state acts against everybody's interests".

[See "*The Changing Concept of Family,* Vol. 11 Australian Journal of Family Law, p 13].

325. The term 'family' has a flexible and wide meaning. It is not one fixed in time and is not a term of art. It necessarily and broadly encompasses a description of a unit which has 'familial characteristics'. Not all families function in the same way. Never the less, they enjoy common characteristics such as those demonstrated by the applicants. Theirs is not of a casual or transitory nature but one that has embraced exclusivity and permanency. They are emotionally and financially inter-dependant and I have no doubt, share common interests, activities and companionship. Their biological and psychological relationship to and mutual care of Patrick makes it so much more obvious. In my view it would stultify the necessary progress of family law in this country if society were not to recognise the applicants as a 'family' when they offer that which is consistent and parallel with heterosexual families, save for the obviousness of being a same-sex couple. The issue of their homosexuality is, in my view, irrelevant. As Nicholson CJ said:

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"... Sexual orientation is no basis upon which to make assumptions about the quality of an individual's relationship or parenting capacities of a person. That is why sexual orientation in and of itself, has been held to be an irrelevant matter in disputes about children under the Family Law Act, unless it somehow impinges upon the best interests of a child."

[See *The Changing Concept of Family,* (supra)]

326. Whilst there have been a number of relationship difficulties specific to the parties in these proceedings, the issue concerning contact between the father and Patrick which I have addressed in this judgment is not dissimilar from that arising in traditional heterosexual family disputes and decided daily by the Court. It is not unique. It is those other issues that bear prominence including the concept of 'family' and the father's role within that family as a donor of genetic material. I do not see him as being a member of the family construct. It is his relationship with Patrick that is the central focus of his role and which should be permitted to grow parallel with the happiness and well-being of the 'family'. When there are tensions between these two positions, I take into account all those relevant considerations to which I have referred and, in the exercise of my discretion, as I am required to do, make my determination in Patrick's best interests.

327. Gay and lesbian families are a relatively newly recognised and, it seems, growing phenomenon in Australian society. Whilst they represent a small minority of families, surveys of lesbian women in NSW have found that approximately 20 per cent have children and over 40 per cent are considering having children in the future. (See V Barbeler, '*The Young Lesbian Report: A Study of Attitudes and Behaviours of Adolescent Lesbians Today*", Twenty Ten Association, Sydney, 1992; *Lesbians on the Loose,* 1995 Readership Survey, Vol 7(3), p 9).

328. Although gay and lesbian families are increasing, they cannot be characterised as an homogenous group for they may take many forms. Children conceived via artificial donor insemination may have only two mothers, others, such as Patrick, may have two mothers and a father, and others, may have two mothers and two fathers. In a rare number of cases a child may have only two fathers. Within each of these family forms itself there may also be variations in the level of involvement of the father or fathers in the child's life. Accordingly, whilst a child may have two mothers and a father, this does not necessarily mean that the father plays a traditional 'fatherly' role. In a survey of 84 women attending the Sydney Lesbian Parenting Conference in 2000, sc 66 per cent of respondents with children conceived via donor insemination

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reported that the donor had no parenting responsibilities or decision making role, and only 12 per cent reported a sharing of parental responsibilities with the donor. In terms of the child's contact with the donor, some 31 per cent had no contact, 33 per cent had 'some' contact, 22 per cent had 'regular' contact, and 13 per cent had 'extensive' contact with the donor relating to the child as a non-resident parent. Those interviewed were divided about the legal role of the donor, with just under one half responding that the donor should not have legal recognition under any circumstances while an equal number reported that legal recognition may be justified in some circumstances. Similar studies conducted in other countries have elicited similar results. (See Report of the Lesbian Parenting Conference 2000, Sydney cited in '*Meet the Parents: A Review of the Research on Lesbian and Gay Families*', The Gay and Lesbian Rights Lobby (NSW) Inc, prepared by Millbank, January 2002)

329. Although the mother and the co-parent in these proceedings would prefer the father to play an avuncular role in Patrick's life, the study discussed above indicates that other lesbian couples may want the donor father to play more of a parental role, albeit that of a non-resident parent. Mothers and fathers in the latter position may be surprised, if not angered, to learn that the biological father, with whom they desire their child to have a parent-child relationship, is not in fact the child's 'parent'. However, for those children who have little contact with their donor and who perceive their family unit as being made up of their two mothers, to be told that a relatively unknown third party is one of their 'parents' may also be upsetting.

330. It is clear that gay and lesbian families were not considered by the legislature when s 60H of the Act was being drafted. These families differ in significant ways from heterosexual families who access artificial insemination services. Such families would rarely envisage a scenario in which a sperm donor had a parental role in the life of a child conceived via artificial insemination. Few, if any, would want the donor involved in the child's life. That section was drafted with a heterosexual model in mind and thus fails to recognise the complexity of family forms that might be created through artificial insemination. Given the diversity of gay and lesbian families and the varying role donors play in the lives of children conceived using their donated sperm, the legislature needs to reassess s 60H of the Act and to consider the ramifications of its application in cases such as this.

331. Finally, these proceedings, in critical ways atypical of those usually heard in the Family Court, have brought into sharp relief a number of significant issues which the Court will face in modern 'family' litigation. Both the mother and co-parent gave evidence of considerable discrimination against lesbian families and indicated that they, together with Patrick, are part of a socially

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disadvantaged minority group. I found this evidence to be of concern. They addressed the importance of Patrick understanding that they, the lesbian parents, are proud of their identity, that he is safe and that he will develop within the fabric of his family a sense of identity and self esteem. I have no doubt that he will also be endowed with the importance of the concept of 'family' through his father, who also must have weathered, at times, the storm of ridicule by bigoted members of our community. There do exist in our community elements of unfounded prejudice.

332. Mr Papaleo styled these proceedings as being immensely complex in involving a clash of values, beliefs and societal expectations, let alone the challenge to issues relating to parental responsibility, psychological versus biological parenting and the status of the co-parent (and the father) at law. In his paper, *The Changing Concept of Family* (supra) at p. 13, Nicholson CJ said that without:

> "... the recognition of all family relationships, equality – the cornerstone of democratic society – is missing; and a public acknowledgment of private affections, commitments, inter-dependencies and identities is denied."

333. Whatever the difficulties that currently exist between the mother, the co-parent and the father and which in my view are capable of sensible resolution, the immutable fact remains that Patrick is loved deeply by them all. That is his privilege. I view those that constitute his 'family', both in the narrow and broad sense, warrant equal treatment with the rest of our community, and certainly by the law.

334. Patrick, who is nearly two years of age is part of our community. He has the right to be treated equally as any other child. So too has the 'family' that nurtures him, houses him and who is charged with the onerous responsibility of leading him forward as a productive participant within our broad society. As family members they have a commitment to mutual interdependence, they share their lives, they care for and love each other and offer common support. They too have a right to be treated equally by the community as any other heterosexual nuclear family. As to the issue of equality, the Hon Madame Justice Claire L'Heureux-Dube, in *Egan v Canada* (1995) 2 SCR 513 at 543 had this to say:

> "Equality, ... means nothing if it does not represent a commitment to recognising each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them

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> as less capable for no good reasons, or that otherwise offend fundamental human dignity".

Later, in a paper *The Search for Equality: A Human Rights Issue* (2000) 25 Queens Law Journal 401 her Honour, said:

> "Equality implies freedom of choice regarding intimate association; true equality means respect for this deeply personal and individual decision".

(Referring to K L Karst, *The Freedom of Intimate Association* (1980) 89 Yale LJ 624).

335. Having regard to the issues addressed in this judgment, it is time that the legislature considered some of the matters raised, including the nature of parenthood, the meaning of 'family', and the role of the law in regulating arrangements within the gay and lesbian community. The child at the centre of this dispute is part of a new and rapidly increasing generation of children being conceived and raised by gay and lesbian parents. However, under the current legislative regime, Patrick's biological and social reality remains unrecognised. While the legislature may face unique challenges in drafting reform that acknowledges and protects children such as Patrick and the family units to which they belong, this is not a basis for inaction.

11. THE COURT ORDERS

336. Having regard to my findings in these proceedings, the proposed orders of the Court are as follows:

> (1) That paragraph 5 of the Orders of 2 June 2000 be and are hereby discharged.
>
> (2) That the father have contact with PATRICK born 11 September, 1999 as follows:
>
> > 2.1 As and from the date of this order until 11 September, 2002:

2.1.1 each alternate Sunday for a period of four hours at times to be agreed between the parties and failing agreement from 10am to 2pm commencing on Sunday 7 April 2002,

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2.1.2 in the event that Father's Day falls on a non-contact weekend, from 10am to 2pm on Father's Day; and

2.1.3 as may otherwise be agreed between the parties from time to time.

2.2 As and from 11 September, 2002 until 11 September, 2003 as follows:

2.2.1 each alternate Sunday for a period of eight hours at times to be agreed between the parties, and failing agreement from 9am to 5pm;

2.2.2 in the event that Father's Day falls on a non-contact weekend from 9am to 5pm on Father's Day;

2.2.3 as may otherwise be agreed between the parties from time to time.

2.3 As and from 11 September, 2003 until 11 January, 2004 in each four week cycle as follows:

2.3.1 in week one on Sunday from 9am to 5pm;

2.3.2 in week three from 9am Saturday to 9am Sunday such contact to continue for a period of two months and thereafter such contact to conclude at 12 noon on Sunday.

2.4 As and from 11 January, 2004 to 11 September, 2004 in each four week cycle as follows:

2.4.1 in week one on Sunday from 9am to 5pm;

2.4.2 in week three from 9am Saturday to 3pm Sunday;

2.4.3 in the event that Father's Day falls on a non-contact weekend from 9am to 5pm on Father's Day;

2.4.4 as may otherwise be agreed between the parties from time to time.

2.5 As and from 11 September, 2004 as follows:

2.5.1 each alternate weekend from the conclusion of school / creche on Friday to the commencement of school / creche on Monday, or in the event that the child is not attending school or creche, from 3.30pm Friday to 8.30am Monday;

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2.5.2 one half of all school holiday periods at times to be agreed between the parties and failing agreement for the second half of all school holiday periods;

2.5.3 in the event that Father's Day falls on a non-contact weekend from 9am to 5pm on Father's Day;

2.5.4 in the event that Mother's Day falls on a contact weekend, such contact be suspended at 9am on Mother's Day;

2.5.5 on the child's birthday and the father's birthday for a period of two hours at times to be agreed between the parties and failing agreement from 4pm to 6pm on the said birthdays;

2.5.6 as may otherwise be agreed between the parties from time to time.

(3) That for the purposes of contact, the father do collect the child from and return the child to the home of the mother and the co-parent.

(4) That paragraph 3 of the orders made on 2 June 2000 do include the following:

"... *AND THAT the father do have responsibility for decisions concerning the child's immediate care, welfare and development whilst the child is having contact with him".*

(5) That pursuant to s.65DA(2) of the *Family Law Act* 1975 (as amended), the particulars of the obligations these orders create and the particulars of the consequences that may follow if a person contravenes these orders are set out in Annexure A and these particulars are included in these orders.

(6) That the appointment of the child representative be discharged from this day

(7) That pursuant to Order 38 rule 25 of the *Family Law Rules* this matter reasonably required the attendance of Counsel.

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I certify that the preceding 336 numbered paragraphs are a true copy of the reasons for judgment herein of the Honourable Justice Guest.

Associate to Guest J

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